155-333

RECORD, CASE No. 14,284.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~261~~. 441

THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND POTOMAC RAILROAD COMPANY, THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, AND JOHN CASSELS, PLAINTIFFS IN ERROR,

vs.

CHARLES T. STEWART.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 14, 1890.

RECORD, CASE No. 14,284.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 261.

THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND POTOMAC RAILROAD COMPANY, THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, AND JOHN CASSELS, PLAINTIFFS IN ERROR,

vs.

CHARLES T. STEWART.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Declaration	1	1
Summons	8	3
Marshal's return	9	3
Plea of The Penna. R. R. Co.	10	4
The B. & P. R. R. Co.	10	4
The A. & F. R'y Co.	11	4
The A. & W. R. R. Co.	11	5
The Va. Midland R'y Co.	12	5
Replication	13	5
Notice of trial	13	6
Order for calendar	14	6

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1893.

	Original.	Print.
Notice of motion for leave to file additional pleas	15	6
Order granting leave to file additional pleas	16	7
Additional plea of The Penna. R. R. Co.	17	7
The B. & P. R. R. Co.	17	7
The A. & F. R'y Co.	18	8
The A. & W. R. R. Co.	19	8
Order to consolidate causes for purpose of trial	20	9
Order beginning trial	21	9
Order continuing trial	22	9
Order continuing trial	23	11
Order continuing trial	24	11
Order continuing trial	25	11
Order continuing trial	26	12
Order continuing trial	27	12
Order continuing trial	28	13
Order continuing trial	29	13
Order continuing trial	30	14
Order continuing trial	31	14
Order continuing trial	32	15
Order concluding trial	33	15
Judgment	34	16
Motion for new trial	35	16
Bond on appeal to general term	36	17
Objections to signing bill of exceptions	38	18
Motion of Va. Midland R'y Co. to amend record of verdict	45	21
Order amending record of verdict	47	22
Order allowing bills of exceptions, &c.	49	22
Stipulation to omit bills of exceptions in printing record	49*a*	23
Bills of exceptions (omitted in printing)	50	—
Motion to strike out bills of exceptions, to dismiss motion for new trial on bills of exceptions, and to strike case from general-term calendar	322	23
Notice of motion	327	25
Order denying motions to strike out, &c.	329	26
Judgment in general term	329	26
Opinion	332	27
Bond for writ of error	343	43
Writ of error	345	44
Citation and proof of service	346	45
Certificate to record	347	46

1 *Declaration, &c. Filed July* 28, 1885.

In the Supreme Court of the District of Columbia. Term A. D. 1885.

CHARLES T. STEWART, Plaintiff,
vs.
THE PENNSYLVANIA RAILROAD COMP., THE BALTIMORE and Potomac Railroad Company, The Virginia Midland Railway Company, Alexandria and Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company. } At Law. No. 26303.

1. The plaintiff sues the defendants, The Pennsylvania Railroad Company, a corporation organized under the laws of the State of Pennsylvania; The Baltimore and Potomac Railroad Company, a corporation organized under the laws of the State of Maryland and acts of the Congress of the United States of America; The Alexandria and Washington Railroad Company, The Virginia Midland Railway Company, and The Alexandria and Fredericksburg Railway Company, which three last-mentioned companies are corporations organized under the laws of the State of Virginia,
2 and all of which companies have an office in the city of Washington and the District of Columbia for the transaction of business of said five companies, for the sum of thirty thousand dollars ($30,000) as damages, and for cause of such suit states:

For that heretofore, to wit, on the 19th day of February, 1885, and prior thereto, the said defendants were engaged as common carriers in the transportation of passengers, persons, and freight upon and along the several lines of railroads belonging to said companies, and among others along the line of the road of said Alexandria and Washington Railroad Company running between the cities of Alexandria and Washington, under an arrangement or contract for their common benefit, the full and exact terms of which are unknown to this plaintiff, and by which they were jointly interested in the running and management of said railroads, they being so engaged and interested in the transportation of passengers, persons, and freight as aforesaid for compensation and otherwise, and the roads of the said defendants being postal roads under and by virtue of the laws of the United States
3 and the regulations of the Post Office Department, the said defendants became entitled to and were employed by the said Post Office Department to transport the mail of the United States upon and along the lines of their said roads; that, for the purpose of discharging the duty of transporting the said mails of the United States, for which the said roads received compensation from the Government of the United States, the said defendants provided the necessary mail postal cars, in which the said mail- were transported as required by said law and regulations, and that the said defendants were engaged in the performance of that duty on the 19th day

of February, 1885, aforesaid; that on the day and year aforesaid this plaintiff was in the service of the United States in the capacity of a railroad postal clerk, and that the route to which he was assigned as such clerk was from said city of Washington, in the District of *Washington, in the District of* Columbia, to the town of Charlotte, in the State of North Carolina, and return; that
4 on the day and year last aforesaid this plaintiff, in the discharge of his duty as such railroad postal clerk and with the knowledge and approval and permission of the said defendants, was in the mail postal car in which the United States mail was then being transported and of which he had partial charge, which was attached to and formed part of a train for the conveyance of passengers and persons from Charlotte, North Carolina, aforesaid to Alexandria and Washington aforesaid on and over said Alexandria and Washington railroad from said Alexandria to said Washington; that on the night of the said 19th day of February, 1885, while the said train was proceeding from said city of Alexandria to the city of Washington, at or near Four-mile run, in the State of Virginia, near which there is a tunnel through which the said road runs, the said train was run into by the Alexandria and Fredericksburg fast freight train which had left the depot of the said Baltimore and Potomac road and was going south therefrom, and a collision occurred by which the said postal car was demolished;
5 that the said collision was caused by gross negligence and carelessness of the said defendants, their agents and employees, and by no want of care or any negligence on the part of this plaintiff; that by the said collision and the destruction of said mail car, thus caused by the want of care and the negligence of said defendants, their agents, servants, and employees, as aforesaid, this plaintiff was severely and seriously injured in his body; that he was buried under the wreck created by said collision, with his face downwards, with his left arm tightly fastened or held by a large piece of timber, with coals of fire and flames all around him and under him, which burned into his flesh, in which position he was compelled to remain until he was taken out by a passenger, and while in said position he was badly and deeply burned in his left breast, large holes burned into his knee-caps, and his back
6 scorched and burned. his head and face badly cut and bruised, his clothing burned off, and other wounds and hurts received and sufferings endured, and that after being rescued as aforesaid in a helpless condition he suffered greatly in body from exposure to the weather and cold, being left for a long space of time at or near the place of collision without any care from said defendants, their agents, servants, and employees, who well knew that said collision had occurred, and when at length removed and taken to the Bradock house, in Alexandria, and thence afterwards to Alexandria infirmary, in said place, he suffered intensely in consequence of said injuries and was compelled to remain in said hospital for three months under special medical and other treatment and was unable to walk for two months, and during all of said time from said collision and injuries until the present he suffered greatly in mind as well as in

body and continues to do so, and has undergone large ex-
7 penses and outlays in efforts to be cured of his injuries and relieved from his sufferings as aforesaid, and that because of said wrongs and injuries his bodily constitution and health has been permanently injured and so impaired as to render it impossible for him to perform manual, clerical, or other labor and to engage in any useful or profitable employment.

Wherefore he claims of said defendants thirty thousand dollars, with interest and costs.

WILLIAM A. COOK,
Att'y for Pl'ff.

The defendants are to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

WILLIAM A. COOK,
Att'y for Pl'ff.

8 *Summons. Issued July 28th*, 1885.

In the Supreme Court of the District of Columbia, the 28th Day of July, 1885.

CHARLES T. STEWART, Plaintiff, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, THE Baltimore & Potomac Railroad Company, The Virginia Midland Railway Company, Alexandria & Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company, Defendants.	At Law. No. 26303.

The President of the United States to the defendants, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By R. J. YOUNG,
Assistant Clerk.

W. A. COOK, *Attorney.*

9 NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendants, The Pennsylvania Railroad Com-

pany, by service on Joseph K. Sharp, superintendent; The Baltimore and Potomac Railroad Company, by service on Joseph K. Sharp, superintendent; The Virginia Midland Railway Company, by service on Nathaniel McDaniel, superintendent; The Alexandria and Fredericksburg Railroad Company, by service on Joseph K. Sharp, superintendent, and The Alexandria and Washington railroad, by service on Joseph K. Sharp, superintendent, August 5, 1885.

CLAYTON McMICHAEL, *Marshal.*

10 *Defendants' Plea. Filed Oct.* 19, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } Law. No. 26303.

And now comes the defendant The Pennsylvania Railroad Company and for plea says it is not guilty as alleged in plaintiff's declaration herein.

ENOCH TOTTEN,
Att'y for Def't.

Defendants' Plea. Filed Oct. 19, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } Law. No. 26303.

11 And now comes the defendant The Baltimore and Potomac Railroad Company and for plea says it is not guilty as alleged in plaintiff's declaration herein.

ENOCH TOTTEN,
Att'y for Def't.

Defendants' Plea. Filed Oct. 19, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } Law. No. 26303.

And now comes the defendant The Alexandria and Fredericksburg Railway Company and for plea says it is not guilty as alleged in plaintiff's declaration herein.

ENOCH TOTTEN,
Att'y for Def't.

Defendants' Plea. Filed Oct. 19, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } Law. No. 26303.

12 And now comes the defendant The Alexandria and Washington Railroad Company and for plea says it is not guilty as alleged in plaintiff's declaration herein.

ENOCH TOTTEN,
Att'y for Def't.

Defendants' Plea. Filed Oct. 19, 1889.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } Law. No. 26303.

And now comes the defendant The Virginia Midland Railway Company and for plea says it is not guilty as alleged in plaintiff's declaration herein.

EPPA HUNTON,
By ENOCH TOTTEN,
Att'y for Def't.

13 *Replication to Defendants' Pleas. Filed Oct.* 26, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
PENNSYLVANIA RAILROAD COMPANY, BALTIMORE and Potomac Railroad Company, Virginia Midland Railway Company, Alexandria & Fredericksburg Railway Company, and Alexandria and Washington Railroad Company. } Law. No. 26303.

The plaintiff joins issue upon the defendants' pleas.

WILLIAM A. COOK,
Att'y for Pl'ff.

Notice of Trial. Filed Oct. 26, 1885.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
PENNSYLVANIA RAILROAD COMPANY, Baltimore and Potomac Railroad Company, Virginia Midland Railway Company, Alexandria & Fredericksburg Railway Company, & Alexandria & Washington Railroad Company. } Law. No. 26303.

14 Take notice that the issue joined in this cause will be tried at the next term of the court.

WILLIAM A. COOK,
Att'y for Pl'ff.

Oct. 26, 1885.

To Enoch Totten, att'y for ——.

Order for Calendar & Note of Issue. Filed Oct. 26, 1885.

In the Supreme Court of the District of Columbia the 26th Day of October, 1885.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA R. R. Co. *et al.* } At Law. No. 26303.

The clerk of said court will place this cause on the calendar for trial.

Last pleading filed Oct. 26, 1885.

ENOCH TOTTEN &
EPPA HUNTON,
Att'ys for Def'ts.
WILLIAM A. COOK,
Attorney for Plaintiff.

To the clerk.

15 *Motion to File Additional Plea. Filed Jan'y* 16, 1888.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26303.

Please take notice that on Wednesday, the 18th day of January, 1888, at the opening of court, or as soon thereafter as counsel can

be heard, I will move the court for leave to file an additional plea in the above-entitled cause.

ENOCH TOTTEN,
Att'y for Def'ts.

To Mr. Wm. A. Cook, att'y for pl'ffs.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court in and for said Dis-
16 trict, commencing the third Monday, it being the seventeenth day, of October, A. D. 1887.

MONDAY, *October* 17, *A. D.* 1887.

By order of Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

FRIDAY, *January 20th, A. D.* 1888.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

CHARLES T. STEWART
vs.
PENNSYLVANIA RAILROAD COMPANY *et al.*, Def'ts. } At Law. No. 26303.

On motion of the defendants, by their attorney, Mr. Totten, leave is granted each of them to file an additional plea.

17 *Additional Plea of Def't Penn. R. R. Co. Filed Jan'y* 20, 1888.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26303.

And for a further plea the said defendant says it was not at the time of the alleged injury and never was a common carrier of passengers and freight in manner and form as in said declaration alleged.

ENOCH TOTTEN,
Att'y for Def't.

Additional Plea of the Defendant The Baltimore and Potomac Railroad Company. Filed Jan'y 20, 1888.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY *et al.* } At Law. No. 26303.

And for a further plea the said defendant says it was not
18 at the time of the alleged injury and never was a common carrier of passengers and freight in manner and form as in said *as in said* declaration alleged.

ENOCH TOTTEN,
Att'y for Def't.

Additional Plea of the Defendant The Alexandria and Fredericksburg Railway Company. Filed Jan'y 20, 1888.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY *et al.* } At Law. No. 26303.

And for a further plea the said defendant says it was not at the time of the alleged injury and never was a common carrier of passengers and freight in manner and form as in said declaration alleged.

ENOCH TOTTEN,
Att'y for Def't.

19 *Additional Plea of the Defendant The Alexandria and Washington Railway Company. Filed Jan'y* 20, 1888.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
ALEXANDRIA AND WASHINGTON RAILWAY COMPANY *et al.* } At Law. No. 26303.

And for a further plea the said defendant says it was not at the time of the alleged injury and never was a common carrier of passengers and freight in manner and form as in said declaration alleged.

ENOCH TOTTEN,
Att'y for Def't.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a circuit court in and for said District, commencing the fourth Monday, it being the 28th day, of January, A. D. 1889.

MONDAY, *January 28th, A. D.* 1889.

By order of Chief Justice Edward F. Bingham, one of the
20 justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

MONDAY, *April 8th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* — Cal. 31. At Law. No. 26298.

and — Consolidated with

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* — Cal. 32. At Law. No. 26303.

By consent of the several attorneys representing the several parties to the above-styled suits, it is this 8th day of April, 1889, ordered that said causes be tried before the same jury and at the same time, but the jury shall render a separate verdict in each case. The consent on behalf of the Virginia Midland is without prejudice to the exception of said defendant to the overruling of
21 its motion to sever.

By the court: E. F. BINGHAM,
Chief Justice.

THOMAS W. JONES, P'l'ff,
vs.
THE PENNSYLVANIA RAILROAD CO., THE Baltimore & Potomac Railroad Co., The Virginia Midland Railway Co., Alexandria & Fredericksburg Railway Co., & The Alexandria & Washington Railroad Co., Def'ts,
Cal. 31. At Law. No. 26298.

and Consolidated with

CHARLES T. STEWART, Plt'ff,
vs.
THE PENNSYLVANIA RAILROAD CO., THE Baltimore and Potomac Railroad Co., The Virginia Midland Railway Co., Alexandria & Fredericksburg Railway Co., & The Alexandria & Washington Railroad Co., Def'ts.
Cal. 32. At Law. No. 26303.

Now come here as well the plaintiffs, by their attorneys, Messrs. Cook and Cole, as the defendants, by their attorneys, Messrs. Totten, Wells, Kent, and Payne, and a jury of good and lawful men of this District, to wit, F. P. May, Charles S. Denham, Thomas A. Ritchie, H. J. Bradley, Franklin Rives, Timothy Gannon, John A.
22 Power, Albert B. Clark, Edward McCauley, William S. Mason, Julien Sears, and Simon A. Hollohan, who, being duly sworn to try the matters of difference between the parties, are respited until the meeting of the court to-morrow morning.

TUESDAY, *April 9th, A. D.* 1890.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts,
Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts.
Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

23 WEDNESDAY, *April 10th, A. D.* 1890.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Plaintiff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES W. STEWART, Plaintiff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are respited till the meeting of the court to-morrow morning.

THURSDAY, *April 11th, A. D.* 1890.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

24 THOMAS W. JONES, Pl'ff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts, } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited till the meeting of the court to-morrow morning.

FRIDAY, *April 12th. A. D.* 1890.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff, vs. PENNSYLVANIA R. R. Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

25 Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court Monday morning next.

MONDAY, *April* 15*th*, *A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl't'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

26 TUESDAY, *April* 16*th*, *A. D.* 1889,

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

WEDNESDAY, *April* 17, *A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

27 THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Defts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further

hearing of the case, are again respited until the meeting of the court to-morrow morning.

THURSDAY, *April 18th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

28 Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

FRIDAY, *April 19th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited till the meeting of the court Monday morning next.

"And by consent and agreement of the counsel represent-
29 ing the several parties to these suits, it is this 19th day of April, 1889, ordered that the jury, in charge of Arthur McDermott, one of the deputy marshals of the court, do visit the point where the collision in question in these cases occurred.

"E. F. BINGHAM, *C. J.*"

MONDAY, *April 22d, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff.
vs.
PENNSYLVANIA R. R. Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited Saturday last, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

TUESDAY, *April 23d*, 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

WEDNESDAY, *April 24th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD Co. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

THURSDAY, *April 25th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA RAILROAD CO. *et al.*, Def'ts. } Cal. 32. At Law. No. 26*298*.

32 Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow morning.

FRIDAY, *April 26th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS W. JONES, Pl'ff,
vs.
PENNSYLVANIA R. R. CO. *et al.*, Def'ts, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA R. R. CO. *et al.*, Def'ts. } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court Monday morning next.

33 MONDAY, *April 29th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

THOMAS W. JONES, Plaintiff,
vs.
PENNSYLVANIA R. R. CO. *et al.*, } Cal. 31. At Law. No. 26298.

and Consolidated.

CHARLES T. STEWART, Pl'ff,
vs.
PENNSYLVANIA R. R. CO. *et al.* } Cal. 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited Saturday last, who, after the

case is given them in charge, retire to their room to consider of their verdict, with permission, if they agree during the adjournment of the court, after reducing their verdict to writing, signing, sealing up, and delivering the same to their foreman, to separate till the meeting of the court Wednesday morning next.

34 WEDNESDAY, *May 1st, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CHARLES T. STEWART, Plaintiff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE Baltimore & Potomac Railroad Company, The Virginia Midland Railway Company, The Alexandria & Fredericksburg Railroad Company, & The Alexandria & Washington Railroad Company. } Cal 32. At Law. No. 26303.

Now again come here the parties aforesaid in manner aforesaid, and the same jury return into court and on their oath say they find said matters in favor of the plaintiff, against The Pennsylvania Railroad Company, The Baltimore & Potomac Railroad Company, The Alexandria & Fredericksburg Railway Company, and The Alexandria & Washington Railroad Company, and assess his damages by reason of the premises at fifteen thousand dollars; and we also find in favor of the defendant The Virginia Midland Railway Company; therefore it is considered that the plaintiff recover
35 against said defendants, The Pennsylvania Railroad Company, The Baltimore & Potomac Railroad, The Alexandria & Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company, $15,000, in manner and form aforesaid, and $—— for his costs of suit, and have execution thereof; and as to the defendant The Virginia Midland Railway Company the plaintiff take nothing by his suit, and that the Virginia Midland Railway Company go thereof without day and recover against the plaintiff $—— for his costs of suit and have execution thereof.

* * * * * * *

FRIDAY, *May 3d, A. D.* 1890.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CHARLES T. STEWART, Pl'ff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, THE Baltimore & Potomac Railroad Company, The Alexandria & Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company, *et al.*, Def'ts.
Cal. 32. At Law. No. 23603.

36 And now come The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, and The Alexandria & Washington Railroad Company, defendants in the above cause, which was, by order of the court, considered with and tried with the case of Thomas W. Jones *vs.* The same defendants, being cause numbered 26298 at law, and move the court to set aside the verdict and grant a new trial on exceptions.

Undertaking on Appeal to the General Term. Filed May 8, 1889.

In the Supreme Court of the District of Columbia, the — Day of ——, 1889.

CHARLES T. STEWART, Plaintiff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, The Baltimore & Potomac Railroad Company, The Alexandria & Fredericksburg Railway Company, The Alexandria & Washington Railroad Company, *et al.*
At Law. No. 26303.

37 The defendants, The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company, having appealed to the general term from the judgment pronounced herein on the 1st of May, 1889, in the circuit court, and John Cassels, surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

THE PENNSYLVANIA RAILROAD COMPANY,
THE BALTIMORE & POTOMAC RAILROAD COMPANY,
THE ALEXANDRIA & WASHINGTON RAILROAD COMPANY,
THE ALEXANDRIA & FREDERICKSBURG RAILWAY COMPANY, *Appellants,*
By ENOCH TOTTEN, *Att'y-in-fact.*
JOHN CASSELS, *Surety.*

This undertaking is satisfactory.
May 8th, 1889.

C. C. COLE,
Att'y for Pl'ff.

Approved.
May 8, 1889.
E. J. BINGHAM, *C. J.*

38 *Objections and Protest of Attorneys for Plaintiffs to and against the Signing of Bills of Exceptions in said Causes, &c. Filed June 25, 1889.*

In the Supreme Court of the District of Columbia.

THOMAS W. JONES
vs.
THE PA. R. R. Co. *et al.* } Law. No. 26298.

and

CHARLES T. STEWART
vs.
THE PA. R. R. Co. *et al.*

Notice to settle exceptions.

Please take notice that on Tuesday next, the 25th day of June, 1889, on the opening of court on that day or as soon thereafter as counsel can be heard, we shall ask Hon. Edward F. Bingham, chief justice, who presided at the trial of the above causes (consolidated), to settle the bills of exceptions in behalf of all the defendants (except the Virginia Midland Railway Company) in the above
39 causes, which bills of exceptions are submitted by us to you this day.
June 20, 1889.

ENOCH TOTTEN,
H. H. WELLS,
For said Defendants.

To Wm. A. Cook, C. C. Cole, for pl't'fs.

In the Supreme Court of the District of Columbia.

THOMAS W. JONES
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26298.

and

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26303.

And now come the attorneys for the plaintiffs in the above-entitled cases, and in response to the notice served upon them
40 on the 20th day of June, 1889, by the attorneys for the defendants, attached hereto, that they would move Hon. Edward F. Bingham, chief justice of said court, on the 25th day of June, 1889, to settle bills of exceptions in said causes and object to the settling or signing of the bills of exceptions submitted with said notice or any bills of exceptions whatever in said causes or either of them on the following grounds, to wit:

First. Because the January term, 1889, of said court, at which said cases were tried, has been finally adjourned without day.

Second. Because no steps whatever were taken by the attorneys for the defendants or either of them to have said bills of exceptions settled or signed during the said term at which said causes were tried, although the verdict was rendered on the 1st day of May, 1889, and the said term did not expire until the 11th day of May, 1889, and by said inaction said defendants waived and lost
41 any right they may have had to have said bills of exceptions settled or signed.

Third. Because the notice hereinbefore mentioned was the first and only notice served upon or given to the attorneys for the plaintiffs of the intention of defendants' attorneys to apply to have bills of exceptions settled or signed in said causes or either of them.

Fourth. Because the term of the court at which said causes were tried expired by limitation and was finally adjourned without day on the 11th day of May, 1889, and the said chief justice has now no power, jurisdiction, or authority to settle or sign bills of exceptions in said causes or either of them.

Fifth. Because the term of the court at which said causes were tried has expired and has been adjourned without day and was not prolonged by adjournment for the purpose of settling or signing bills of exceptions in said causes by any valid, proper, or binding order for that purpose.

42 Sixth. Because during the term at which said causes were tried the defendants' attorneys did not prepare and submit to or leave with the attorneys for the plaintiffs or either of them any bills or bill of exceptions proposed by them to be settled in

said causes, nor did the former give the latter, during said term, any notice of their in*at*tention to apply to the justice who presided at the said trial to settle or sign any bill or bills of exceptions in said causes or of their intention to apply to the court for an order prolonging said term by adjournment for such purpose.

Six & one-half (6½). Because no valid motion for a new trial was made during the term at which said causes were tried in either of said causes. The motion which was made for a new trial on exceptions is too general and vague and not in conformity to *to* the rules of the court and invalid, and no notice was given to attorneys for plaintiffs of the filing of said motion or that the same would be called to the attention of the court.

Seventh. That no motion was made during said term at
43 which said causes were tried no- has any since been made for a new trial of said causes or either of them upon bills of exceptions, and the time within which such motion could be made or filed expired long before the submission of said bills of exceptions and the giving of said notice to the attorneys for the plaintiffs.

Eighth. There has been no appeal by defendants or either of them from any judgment of the circuit court overruling a motion for a new trial in said causes or either of them or from the judgment for money in favor of plaintiffs against said defendants in said causes or either of them, and the time within which such an appeal could be taken expired long prior to the submission of said bills of exceptions or the giving of said notice by attorneys for the defendants to the attorneys for plaintiffs.

Ninth. There is no motion for a new trial or appeal pend-
44 ing in either of said causes and the time within which either could be filed or taken expired long before the submission of said bills of exceptions and the giving of said notice by attorneys for defendant- to the attorneys for plaintiffs, and the alleged rulings of the court contained in said proposed bills of exceptions can only be reviewed by means of such motion or appeal.

Tenth. The rulings of the court and the tendency of the evidence which took place and was introduced at the trial of said causes are not truly or accurately set forth in said proposed bills of exceptions.

For the foregoing and other reasons apparent in the record of said causes the attorneys for the plaintiffs object to and protest against the settling or signing of any bills of exceptions in said causes or either of them.

W. A. COOK,
C. C. COLE,
Attorneys for Plaintiffs.

45 *Motion of Virginia Midland Railway Co. to Amend Record. Filed July* 5, 1889.

In the Supreme Court of the District of Columbia.

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY and Others. } At Law. No. 26303.

And now comes the defendant The Virginia Midland Railway Company and moves the court to amend the record in this cause by recording now for then the verdict rendered by the jury in this cause in favor of the said defendant on the 1st day of May, 1889, by adding to the verdict as then recorded, immediately following the words "fifteen thousand dollars," the following words, which were then found and announced in open court by the said jury as a part of their verdict in said cause, the same having been inadvertently omitted by the clerk in recording said verdict, to wit, "and we also find for the defendant The Virginia Midland Rail-
46 way Company."

LINDEN KENT,
Att'y for Va. Mid. R'y.

We consent to the amendment of the record as prayed herein.

——— ———.

Linden Kent, being duly sworn, states that a copy of the within motion was duly served on Enoch Totten, Esq., counsel for the defendants other than the Virginia Midland Railway Co., who replied that he did not care to be present at the hearing of the motion and had no objection to urge against the granting of the same.

LINDEN KENT.

Subscribed and sworn to before me this 13th day of July, 1889.

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Ass't Clerk.

We waive notice of this motion on behalf of pl'ffs of July 3d, '89.

C. C. COLE,
Att'y for Pl'ffs.

47 *Court Proceedings.*

Proceedings before the supreme court of District of Columbia, holding a special term and circuit court in and for said District, commencing the second Monday, it being the thirteenth day, of May, A. D. 1889.

MONDAY, *May 13th, A. D.* 1890.

By order of Chief Justice Edward F. Bingham, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

SATURDAY, *July 13th, A. D.* 1889.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

CHARLES T. STEWART, Pl'ff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY and Others, Def'ts. } At Law. No. 26303.

"On motion of the attorneys for the Virginia Midland Railway Company, it appearing that due notice of such motion has been
48 given to the attorneys for the other defendants as well as the attorneys for the plaintiffs, and it further appearing to the undersigned, who presided at the trial of said cause, from his minutes, and the same being still fresh in his recollection, and from the written verdict signed by the jurors and filed in the papers of this cause, that on the 1st day of May, 1889, when the jury rendered its verdict in said cause, they found as a part thereof in favor of the said defendant, The Virginia Midland Railway Company, in words following, to wit: "And we also find in favor of the defendant The Virginia Midland Railway Company;" and it further appearing from the inspection of the record of said verdict that the clerk omitted to record the aforesaid quoted words, it is, this 13th day of July, 1889, ordered by the court that the clerk of this court do now record the said quoted words in the record of said verdict immediately after the words "fifteen thousand dollars," occurring therein, to have the same force and effect as if the same had — recorded on the said 1st day of May, 1889, with the residue of said verdict.

"E. F. BINGHAM,
"*Chief Justice.*"

49 Filed July 15, 1889. Chief Justice Bingham.

CHARLES T. STEWART, Pl'ff,
vs.
THE PENNSYLVANIA RAILROAD COMPANY *et al.*, Def'ts. } At Law. No. 26303.

Now again come here the said defendants, by their said attorneys, and tender to the court here their bills of exceptions to the rulings of the court on the trial of this case, and pray that they may be duly signed, sealed, and made a part of the record now for then, which is done accordingly.

"And now come the said defendants, The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, and The Alexandria and Washington Railroad Company, and move the court, on the bill of exceptions this day filed, to set aside the verdict and judgment in this cause and to grant a new trial herein.

"ENOCH TOTTEN,
"*For said Def'ts.*"

49*a* Supreme Court of the United States, October Term, 1893.

THE PENNSYLVANIA RAILROAD Co. *et al.*, Pl'ffs in Error, *vs.* THOMAS W. JONES } No. 260.

and

THE PENNSYLVANIA RAILROAD Co. *et al.*, Pl'ffs in Error, *vs.* CHARLES T. STEWART. } No. 261.

It is hereby stipulated and agreed by and between the counsel for the respective parties in the above-entitled cases that as the bill of exceptions in each case is identical the same may be omitted in printing the record in the case of The Pennsylvania R. R. Co. *et al. vs.* Charles T. Stewart, No. 261.

ENOCH TOTTEN,
Counsel for Pl'ffs in Error.
WILLIAM A. COOK,
Counsel for Def'ts in Error.

49*b*–321 [Endorsed:] 14283 & 14284. Sup. Court U. S., Oct. term, 1893. Nos. 260 & 261. The Penna. R. R. Co. *et al.*, pl'ffs in error, *vs.* Thomas W. Jones. The Penna. R. R. Co. *et al.*, pl'ffs in error, *vs.* Charles T. Stewart. Stipulation of counsel to omit bill of exceptions in No. 261 in printing record in that case. Office Supreme Court U. S. Filed Jul- 24, 1893. James H. McKenney, clerk.

322 *Motion to Strike out Bills of Exceptions, to Dismiss Motion for New Trial on Bills of Exceptions, and to Strike Case from General Term Calendar. Filed Oct.* 5, 1889.

In the Supreme Court of the District of Columbia, in General Term.

THOMAS W. JONES *vs.* THE PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26298.

and

CHARLES T. STEWART *vs.* THE PENNSYLVANIA RAILROAD COMPANY *et al.* } At Law. No. 26303.

And now comes the said plaintiffs, by their attorneys, and, appearing in the general term specially for the purpose of objecting to the jurisdiction of the said general term in each of said causes and for no other purpose whatever, move the court as follows, to wit:

First. To declare that the bills of exceptions filed in the
323 clerk's office in each of said causes on the 15th day of July,

1889, form no part of the record thereof, and to expunge and strike them from the files of the court.

Second. To dismiss the motion for a new trial upon bills of exceptions filed in each of said causes in the clerk's office on the 15th day of July, 1889; and,

Third. To strike said causes from the calendar of the general term.

Said motions are based upon the following grounds, amongst others, to wit:

First. Said causes were tried at the January term, 1889, of the circuit court, which expired by limitation and was adjourned without day on the 11th day of May, 1889, and said term was not prolonged by adjournment for the purpose of preparing bills of exceptions in said causes, nor did the counsel for defendants during said term prepare bills of exceptions and submit the same to counsel for plaintiffs or notify them of any time at which it was proposed that the same should be settled, or that application would be made to the court to settle bills of exceptions at all or to extend the term
324 for that purpose, but said bills of exceptions were prepared after the final adjournment of said term and settled and signed on the 15th day of July, 1889, without the consent of the attorneys for plaintiffs and against their objections and protests.

Second. The chief justice who presided at the trial of said causes had no authority or jurisdiction to settle and sign said bills of exceptions on the 15th day of July, 1889, when the same were done.

Third. At the time said bills of exceptions were settled and signed no motion for a new trial or appeal was pending, and the time had then expired within which the defendants could legally make such motion or take such appeal.

Fourth. The only motion for a new trial filed in said causes within four days after verdict was a motion "on exceptions," addressed to the justice who presided at the trial, of which the general term could obtain jurisdiction only by appeal from the judgment of said justice overruling said motion, and no such judgment was made, and consequently no appeal was or could have been taken.

325 Fifth. Said motion for a new trial "on exceptions" was defective in failing to state the specific grounds upon which it was based, and no notice was given to the attorneys for the plaintiffs of the filing of said motion or of the intention of defendants' attorneys to move the court to act thereon, and said justice could not properly and did not take jurisdiction thereof or act thereon, and the defendants' attorneys abandoned the same.

Sixth. No appeal has been taken by the defendants from any judgment of the circuit court in said causes or from any judgment or ruling of the justice who presided at the trial.

Seventh. No motion for a new trial upon bills of exceptions was made in either of said causes within four days after verdict or at the time at which said causes were tried.

326 Eighth. The motion for a new trial upon bills of exception filed in said causes on the 15th day of July, 1889, was filed

more than four days after verdict and after the term at which said causes were tried and was not filed in the circuit court.

Ninth. Because said bills of exceptions were settled and signed and said motions for a new trial were made, in violation of the law and the rules of said court in relation thereto, as set forth in sections of the Revised Statutes of the United States relating to the District of Columbia, numbered from 803 to 806, both inclusive, and the general rules of said court numbered 2 and from 54 to 65, both inclusive, and 89, which are hereby referred to and made a part of this motion.

W. A. COOK,
COLE & COLE,
Attorneys for Plaintiffs.

327 To Enoch Totten and H. H. Wells, attorneys for the defendant-.

GENTLEMAN: Take notice that the foregoing motions have been filed in the above causes, and that on the 21st day of October, 1889, at the meeting of the court on that day, or as soon thereafter as counsel can be heard, we will call the same to the attention of the court and ask its judgment thereon.

Respectfully,

W. A. COOK,
COLE & COLE,
Attorneys for Plaintiffs.

Received copy of the foregoing motion and notice this 5th day of Oct., 1889.

ENOCH TOTTEN,
For Appellants.

328 *Proceedings in General Term.*

MONDAY, *April 7th*, 1890.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, April 7th, 1890.

Present, presiding: Justices Hagner and James; Justice Cox absent, holding equity court, and chief justice holding criminal court.

MONDAY, *June* 23, 1890.

Session resumed pursuant to adjournment.
Present, presiding: Justices Hagner, Cox, and James.

* * * * * * *

THOMAS W. JONES
vs.
THE PENNSYLVANIA RAILROAD COMPANY & Others } At Law. No. 26298.

and

CHARLES T. STEWART
vs.
THE SAME DEFENDANTS. } At Law. No. 26303.

Opinion, verbal, by Mr. Justice Cox, sustaining the verdict of the jury, at special term and refusing new trial.

329 THOMAS W. JONES
vs.
THE PENNSYLVANIA RAILROAD CO. & Others. } At Law. No. 26298.

and

CHARLES T. STEWART
vs.
THE SAME DEFENDANTS. } At Law. No. 26303.

The motions of the plaintiffs filed in these causes to strike out the bills of exceptions and dismiss the causes from the calendar of the general term having been argued by counsel for the respective parties and considered by the court in general term and overruled at a former term of the court, and formal order overruling the same not having been entered on the minutes at length at that time, though noted therein at the time, it is this 23d day of June, 1890, now for then, considered and ordered that the said motions and each of them filed in each of said causes be, and the same are hereby, overruled.

* * * * * * *

CHARLES T. STEWART
vs.
THE PENNSYLVANIA RAILROAD COMPANY and Others. } At Law. No. 26298.

And now comes again the parties, by their attorneys, and thereupon, on consideration of the defendants' motion for a new trial upon bills of exceptions and the argument thereon by
330 counsel for the respective parties, it appears to the court that there is no error in the record of the judgment of the special term entered in this case on the first day of May, 1889. It is therefore this 23d day of June, 1890, by the court in general term considered that the defendants' said motion for a new trial be, and the same is hereby, overruled, and that the plaintiff do recover against the said defendants, to wit, The Pennsylvania Railroad Company, The Baltimore & Potomac Railroad Company, The Alexandria and Washington Railroad Company and The Alexandria and Fred-

ericksburg Railway Company, and John Cassels, the surety for said defendants upon appeal, the amount of the judgment of the said special term, to wit, the sum — fifteen thousand dollars, with interest thereon from the date of the judgment of the said special term until paid, and the costs of this suit, to be taxed by the clerk, and
331 that he do have execution thereof.

332 *Opinion of Justice Cox in General Term. Filed July* 3, 1890.

CHARLES T. STEWART, Plaintiff, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, THE Baltimore & Potomac Railroad Company, The Virginia Midland Railway Company, The Alexandria & Fredericksburg Railway Company, The Alexandria & Washington Railroad Company, Defendants.	At Law. No. 26303.

Opinion delivered by Mr. Justice Cox June 15, 1890.

I am requested to deliver the opinion of the court in the cases of Thomas W. Jones and Charles T. Stewart *vs.* The Pennsylvania R. R. Co. and others.

It appears that at a place called Four-mile run, some four miles south of the Long bridge, on the road to Alexandria, the Alexandria and Washington railroad passes through a culvert. The culvert is not wide enough to admit of two tracks, and consequently the two tracks approach the tunnel and converge and interlace at that point, so as virtually to become only one track. Just after passing through the tunnel they separate again into the two original tracks. On either side of the tunnel there is, or was, an arrangement for automatic electrical signals, the first operation of which is, that when one train approaches the tunnel, if the device is in working order it will exhibit a red light on the opposite side of the tunnel as a warning to the other train which approaches, that the track is already occupied. If the track is not so occupied when a train approaches, it will show a clear white light.

The plaintiffs in these cases were postal clerks in the service of the United States, and on the 19th of February, 1885, about 10 o'clock in the evening, they were on a train of the Virginia Midland R. R. Co., which was coming north and approaching the tunnel. A fast freight train, said to be under the direction of the Alexandria and Fredericksburg R. R. Co., was going south and approached the tunnel at about the same time. The narrowness of the tracks in the tunnel of course makes it necessary, under these circumstances, that one train shall stop and allow the other to pass through. There is conflicting testimony as to the condition of the signal arrangement on this occasion; that is to say, as to whether it was in working order or not. At all events, neither train did stop. The north-bound train approached the culvert, and the engineer of that train observed the other train on the northern side of the tunnel,

but supposed that it was stationary and he did not stop. He soon afterwards discovered, however, but too late, that it was in motion and approaching. Instead of stopping he put on all his steam for the purpose of rushing through the tunnel and getting onto the double track before the other train could reach the point where the tracks diverge. He miscalculated, however, and the result was a fearful collision, in consequence of which a number of people were killed and these plaintiffs very seriously injured.

They brought suit against the Pennsylvania R. R. Co., the B. & P. R. R. Co., the Virginia Midland R. R. Co., Alexandria and Fredericksburg R. R. Co., and the Alexandria and Washington R. R. Co. The declaration alleges that the defendants were running a through line from Baltimore to Quantico, in Virginia, and that they were operating these roads upon joint account, dividing the profits and being a species of partnership, with a partnership liability between them—not strictly a partnership, but that there was at
333 least a joint liability—so that all the officers and employees on any one of these roads were in fact the agents of all these companies, and that these companies were, therefore, all responsible for the damages resulting from the negligence of such agents or employees. The suit was brought originally against all these railroad companies upon that theory.

Upon the trial a great deal of testimony was given, much of it of a circumstantial character, and a great many instructions were asked, and the result of it was a verdict in favor of the Virginia Midland R. R. Co. and against all the other companies, in favor of one of the plaintiffs for $15,000, and in favor of the other for $10,000. The cases come before us on a motion for a new trial on sixty-four bills of exception.

It is hardly necessary to say that to discuss these in detail would be an endless task. I think, however, that the instructions may be classified and may be considered in groups, so to speak. The body of the instructions actually given by the court will be found in the charge to the jury, and I do not know that I can do better in this case than to examine the testimony set out in the bills of exceptions and compare it with the charge and then ascertain how far the testimony justifies the charge, and afterwards consider the exceptions.

The first effort was to prove the solidarity of interests between the B. and P. R. R. Co., the Alexandria and Washington R. R. Co., and the Alexandria and Fredericksburg Railway Co., and sundry items of evidence were offered with that view: For example, Mr. Wilkins, who was the receiver of the Alexandria and Washington Co., was examined, and he testified, as appears from the record on page 219, that when he was appointed receiver he found in existence certain running arrangements among the Alexandria and Washington, Alexandria and Fredericksburg, and Baltimore and Potomac railroads by which they *prorated their expenses and earnings and were operated by the same operating officers and agents*, and that he continued such arrangement. Again, on page 225, he says: "The rights of the A. and F. railway are somewhat difficult to

define, because there has never been any written contract between the respective interests. *The B. and P., the A. and W., and the A. and F. roads have a community of interests south of Washington, which make it most economical and desirable to operate as one interest, although an accurate subdivision of both earnings and expenses has at all times been made from the books of the auditor and treasurer.*" He had stated the same in his testimony in another case, and is asked if it is correct, and he says, "Yes, sir; that is correct."

Another circumstance offered in evidence was, that the employees of all three of these roads were paid by the same common agent from a pay-car that started from the east—that is, from Baltimore, and went all along the lines and paid the men employed on these different roads. Another circumstance adverted to is the advertisement of travel over these roads, which I shall have occasion to refer to in another connection. It is called the Great Pennsylvania route, and embraces all these roads. Still another circumstance which is not without its weight, probably, is that the officers of the three roads would seem to be employed interchangeably upon these different roads. As an illustration of that, we are referred to the fact that this very freight train which came into collision with the passenger train was officered by parties on the roll of these different companies. The engineer and fireman of the freight engine, at the time of the collision, were both on the pay-roll of the B. and P. R. R. Co. for the months of January and February, 1885, and the conductor and brakeman were on the pay-roll of the A. and F. for said months. One of the brakemen on the freight train, who had been on the line for about eight or nine months prior to the accident, had been braking on the trains in the yard at Washington and on the line from Baltimore to Quantico, etc. It is also testified that in the running of trains on all parts of the roads from Washington to Quantico, in the operation of said roads from Washington, employees of one company used the rolling stock of the other companies, and engines of one company hauled cars of the others.

Very little importance should be attached to the circumstance that the cars of one company are on the roads of other companies, because that is an arrangement existing all over the country. But when we find that the officers on the pay-rolls of these different companies seem to be acting together, sometimes on the same train, it bears very much the appearance of an operation on joint account. Another circumstance relied on is the fact that Mr. Sharp, of the B. and P. R. R., had charge of these automatic signals on the A. and W. road. According to the testimony, he had charge of the trainmen all along the line of these three roads.

These are circumstances offered to the jury with a view of showing a joint interest in the operation of these three roads on the part of these companies. There are undoubtedly arrange-
334 ments between companies having connecting lines that do not involve in any way a joint liability. For the convenience of the public, for example, the passenger is allowed at one end of a series of connecting lines to purchase what is called a coupon ticket

over the whole line, and to pay his fare in one sum. That does not amount to anything like a partnership or import a joint obligation which the companies assume. In that case, each coupon represents simply the fare over one of the connecting lines. In that case, the company receives simply the fare over its own line. It pays its own expenses out of its own earnings, and has no interest in anything but the proportion of the fare which the coupon represents. But when companies having connecting lines agree to divide their earnings and their expenses also upon some basis such as that of trackage or mileage, or of the value of stations and other property, quite a different aspect of affairs is presented. It may be, for instance, that one of such companies has to pay a much larger expense per mile than the other, and if the expenses are prorated according to the mileage, it would follow that it would be taking from the earnings of the other companies. And so, if it paid much less expense than the others, it would be giving to them. This gives each company a direct interest in the business of the other roads. It does not constitute a commercial partnership, and we do not suppose that several railway companies could enter into a commercial partnership which would involve a joint liability for all debts and obligations of every description of each company, or necessitate the joining of them all in an action sounding in contract; but here there was shown a joint interest in the transactions and in the earnings of a particular service, and therefore each company and its agent would, in the prosecution of that business over its line, be the agent of all the others as well as acting in his own interests,

Therefore, it would follow, that each company would be liable for the negligence of those agents.

There is a question made in the argument, how far it is possible for several connecting railroad companies to enter into an arrangement of this sort. We have been referred to a case in the 21st Howard, in the Supreme Court, to show that two independent companies could not consolidate themselves into one. That is no doubt true, unless it is provided for by statute. But at the same time the Supreme Court recognized the rule as generally prevailing, and recognized by State authorities, that one company may contract for the transportation of goods beyond its own line and become responsible for their safe transportation, and the same is true as to passengers. If they can do that, it is pretty difficult to define exactly the limits of their capacity to contract beyond their own lines. The moment a train passes from one road to another, according to the custom, it passes into the control of the officers of that road, and yet if the original company has assumed that liability, it is not affected by the fact that on each road the general control over the train is exercised by the officers of that road, who become, *pro hac vice*, those of the company which contracted to transport safely over that road beyond its own line.

In the case of Insurance Company *vs.* The Railroad Company, reported in 104 U. S., there is a squinting at this sort of an arrangement, although the question was really not involved in that case,

where it was sought to make several connecting lines of road all responsible for an injury sustained on one of them. That contention was not sustained. Judge Harlan in his opinion, speaking of the arrangement that did exist, said:

"Such an arrangement did not, in our opinion, involve joint liability upon the part of the railroad companies, or make them partners either *inter esse* or as to third persons. Each company *bore the general expenses of its own route and of all transportation over it. The division, upon the basis merely of distance, of the aggregate pay for the entire route covered by the roads of these companies gave each one no greater amount than perhaps it would have earned* had the dispatch company contracted with each, separately, for the transportation of the cotton."

That is to say, where there was no division of the general expenses, and each company took its share of the fare and attended to its own expenses, there was no liability. Now, the converse of that proposition is not asserted; but there is room for an implication that the division of expenses as well as of the gross earnings might involve this joint liability.

As to the right of corporations to make arrangements of that sort we find a series of cases referred to in the late work, Morawitz on Corporations, in which it is said—and I read from section 220:

"SEC. 220. The management of the affairs of a corporation cannot be taken out of the hands of its regularly appointed and responsible agents and transferred to the agents of another company. It follows, therefore, that a corporation cannot enter into a copartnership even to further its proper enterprise. For the existence of a copartnership would not only interfere with the management of the corporation by its regularly appointed officers, but would control the authority of the stockholders themselves and involve the corporation in new responsibilities.

"SEC. 221. It is well settled that a railroad company may, without express authority in that behalf, make contracts to convey passengers and freight to points beyond the limits of its own line and as a necessary incident to this right it may make contracts with other carriers for the regulation of their joint business.

"In practice it is often difficult to determine whether a traffic arrangement between two companies be authorized by their charters or not. Each case must depend largely upon its particular circumstances. But the general principles which govern are clear. A corporation cannot enter into a partnership nor can it delegate any of its franchises to another company, whether by a sale, a lease or a mere license. And it is settled that the enterprise for the prosecution of which a corporation was formed cannot be extended beyond the limits fixed by the company's charter. But all corporations have implied authority to enter into contracts for the purpose of attaining their legitimate objects; and accordingly railroad companies may make any reasonable arrangements with each other for the purpose of regulating and increasing their legitimate joint traffic.

"SEC. 222. Thus it has been held that railroad companies owing connecting lines may, by contracts between each other, fix the time

of running trains and the rate to be charged upon transportation." "The companies may agree, and individuals may agree, to certain rates of transportation which may be considered mutually advantageous. Neither company has parted with its corporate power; each acts for itself and under its own power of fixing the rates for transportation, and they both agree that the charge shall be uniform throughout the line." "Agreements between companies owning connecting lines providing for a division between them of all their earnings derived from joint traffic upon fixed proportions are authorized; and an agreement of this kind may be valid, although a larger portion of the joint earnings be given to one company than is in proportion to the work which it has done."

Now, if a company can contract to carry passengers and freight safely beyond its own lines, it cannot, of course, do that without the consent of the connecting companies, and upon such conditions as they may prescribe; and I do not see why one of the conditions upon which the companies may agree that their lines shall be used interchangeably may not be, that the general expenses of the whole traffic, as well as the earnings, may be apportioned among them; and if that is done, then, as I have endeavored to show, it establishes an interest in each company in the traffic over each line and makes the agent of each company the agent of all for the purposes of conducting that business.

The charge of the justice in special term on this point, at page 265 of the record, is as follows:

"The Baltimore and Potomac Company has shown, by its charter, that its road proper stops at the south end of the Long bridge. But it is claimed by the plaintiffs that several years before the occurrence of the collision an arrangement was made by the Baltimore and Potomac, the Alexandria and Washington, and the Alexandria and Fredericksburg railroad companies, which was in force at the time of this accident, by which these three companies were to have a community of interest in operating the three roads as a single line in the business of transporting freight and passengers. It will be your duty to carefully consider the testimony relating to this claim thus made, and if you find therefrom that there was an arrangement by which the several trains run by each company over these roads were in the interests of all, each contributing to the expense and sharing a portion of the profits, as they might be determined by a common agent, according to a rule agreed upon by them, each company would be liable for an injury occurring by the negligence of the employees on any one of such trains, if under the particular circumstances the injured party, as a matter of law and fact, be entitled to a recovery from either party. This inquiry and direction has fitting application to the fast freight train south bound which was in collision, inasmuch as it started from Baltimore to run over the entire road of each of these companies to Quantico. You will look to the evidence for the purpose of determining, as far as you may, whether it came within any such alleged arrangement by plaintiff, as I have already mentioned. To determine whether there was any such arrangement it will be proper for you to inquire whether the

evidence shows that trains run over the tracks of these three companies to transact their business were made up of cars or locomotives belonging to one or two or three of the companies indifferently, as might be convenient, and whether the employees running
336 and having charge of such trains were those of either of the companies as might be suitable or convenient for the occasion; whether the general manager, superintendent, train master, and other officers having control of the business were the same person, and whether such officers in fact conducted the business on and over the roads of these three companies as a single business of that line, so far as the public had opportunity of knowing, the accounts being kept by a common agent, who made a division of expenses and profits between these companies according to an arrangement understood by and known to each of these companies and their privies, but unknown to the public, including the plaintiffs.

"If you shall find these several inquiries in the affirmative, then as to these plaintiffs, it will be your duty to regard these defendant companies as joint principals, each having an interest in the trains so run upon said line, and jointly and severally liable for the negligence of any of the employees upon any of such trains, provided you shall find that the Alexandria and Washington Railroad Company is properly sued in this action from the evidence and under instructions already given."

Some criticism has been made upon this part of the charge which refers to the probability that the public did not know of any arrangement other than that which appeared upon the face of things; but I think that is justified by the language of the Supreme Court in the case to which I shall refer presently, of the Railroad Company *vs.* Brown.

This expresses the law, as we understand it, upon the facts which had been given in evidence to the jury, and the jury could infer therefrom the fact of the joint interest of all these companies in this business; and it seems to us that the facts which were testified to were sufficient to go to the jury. It is, of course, a matter of judgment what conclusion should be drawn from them, but we think that they were sufficient *prima facie* evidence to lay before the jury, and if the jury found the joint interest of all these companies, the law is properly stated by the court in its charge.

At the trial, there was an effort on the part of the other companies to throw the burden of this loss upon the Virginia Midland Co., by showing that the negligence of the engineer on that train was the real cause of the accident. The name of the engineer was Bruce. It turned out upon the proof, that if there was a combination of all these other companies, the Virginia Midland was not in that combination. They simply paid a certain compensation for the use of the roads and for the privilege of passing their trains over the other roads. They had no participation in the earnings of the other companies. If, however, the engineer of that train was negligent and the accident was attributable to that negligence, it is very true, that this railroad company would be responsible equally with the others, and the judge so instructed the jury.

But it further appears in the case that, when that train reached the track of the Alexandria and Washington road it was under the supreme control of another person, Mr. Bennett, who was called a pilot, representing the Baltimore and Potomac railroad and the Alexandria and Fredricksburg road, or the combination, as the case may be—representing other companies, at all events; that he had so far the actual control of the train that he might direct it to go or stop. If that be true, the court was right, we think, in saying that whether the Virginia Midland Co. was responsible or not, the parties represented by Mr. Bennett would be equally so.

The jury found substantially, as we infer, that Bruce was not in fault, and that the accident was not to be attributed to his negligence and they exonerated the Virginia Midland Co.

The next question is, how far the Pennsylvania R. R. Co. is to be connected with this combination, with these other roads, the B. & P., A. & W., and the A. & F. A number of circumstances were offered in evidence tending to show that behind the B. & P., if not behind the other two roads, stood the Pa. R. R. Co. as the active manager of all. I believe the Pa. R. R. Co. owns the majority of the stock of the B. & P., and perhaps all of its bonded indebtedness, amounting to nearly $2,000,000, and all the bonded indebtedness of the A. & F. Co., amounting to $1,000,000. These facts alone, however, would not be sufficient to establish an identity between the Pennsylvania Co. and these companies, because any creditor of the road, or any stockholder would be in the same relation and the circumstance alone of being a creditor or stockholder would not make the Pennsylvania Co. any more liable than any individual stockholder. And so the judge told the jury; but he said that these circumstances might be offered in evidence in connection with other circumstances, and that if there was evidence tending to prove that the Pennsylvania R. R. Co., in its corporate capacity, and not as a creditor or stockholder, did exercise control over any of these companies, directing its business, controlling it and
337 managing it, then it would follow that the company was really identified with them in interest and also in responsibility.

The first evidence offered on this subject on the part of the plaintiff was the testimony of Mr. Barbour, who was formerly the president of the Virginia Midland R. R. Co., which showed the arrangement by which the trains were run over these roads, and that it was made directly with the chief officers of the Pennsylvania Railroad Company. He said, in answer to a question: "So far as the contract was made, it was an entirety with the Pennsylvania railroad people from Alexandria to Washington. There was no division when the matter was discussed with Mr. Roberts and the principal officers of the Pennsylvania road. There was no discussion as to who owned the road between Alexandria and the south end of the Long bridge, or who owned the line from the south end of the Long bridge to the 6th-street depot. *We discussed it as an entirety, as property under the control of the Pennsylvania Railroad Company. They were running the Baltimore and Potomac, and they were*

running a through line from New York to Quantico in the latter part of the period.

Q. The Pennsylvania Railroad Company were? A. *Yes, sir; the Pennsylvania authorities.* I would not say the Pennsylvania Company in its legal sense. There might have been some parties interposed, but *I dealt, as the chief executive officer of the Midland, with these gentlemen.* They divided the road from Alexandria to Washington, as I understand it. These gentlemen had some division.

Q. The arrangement that you did make for the privilege of running your trains from Alexandria into Washington over the Washington and Alexandria track and the Baltimore and Potomac track *was made with the authorities of the Pennsylvania Railroad Co.? A. Originally, yes, sir.*

Q. What I want to know is, if you remember whether your company was to pay anybody anything for the privilege of running your Midland trains from Alexandria to Washington and back, or whether they gave you that privilege for nothing. He answered: "No, sir; I stated in the beginning that we were to pay a *per capita*, I think thirty-five cents for each passenger, and so much on freight for each car-load, or by the ton.

Q. "And that arrangement was made with Mr. Scott, the president of the Pennsylvania Railroad Company? A. With Mr. Scott and Mr. Roberts. I think originally with Scott and later with Roberts, with some modifications."

He amplifies this same idea in other parts of his testimony, which I think it is hardly necessary for me to repeat more at length.

And there was offered in evidence a report of the board of directors of the Pennsylvania Railroad Company, which is found on page 107 of the Record, being the report of March 2, 1885, in which the board of directors submitted their report for the year 1884, "*with such data, relating to the lines controlled by your company as will give you a clear understanding of their physical and financial condition.*" It commences:

First. The Pennsylvania Railroad division.

Second. *The Baltimore and Potomac railroad connects your lines with Washington and the South.* It shows the following results for 1884.

Then comes the Alexandria and Fredericksburg railroad:

"*The Alexandria and Fredericksburg railway is still operated by trustees. Its results show an improvement over the preceding year.*"

The report of March 1, 1886, found on page 190 of the Record, contains the same expression.

"The Baltimore and Potomac Railroad Company connects your lines with Washington and the South."

This is not, of itself, conclusive, but still it is an indication in the direction of assertion of control by this company over the Baltimore and Potomac and the Alexandria and Fredericksburg roads.

Again comes the advertisement, which I referred to a little while ago, of the Great Pennsylvania route to the North, West and Southwest. Then it goes on to say that *trains leave Washington from the*

station at the corner of Sixth and B streets, for Chicago, and they leave for Alexandria.

Then it refers to the Alexandria and Fredericksburg railway and the Alexandria and Washington railroad, and says: "*Tickets and information at office, northwest corner of 13th street and Pennsylvania avenue, and at the station,* where orders can be left for the checking of baggage for hotels and residences; signed, Charles E. Pugh, general manager; J. R. Wood, general passenger agent." These same persons are the general manager and general passenger agent of the Pennsylvania Railroad Company.

Perhaps one of the most important facts is the sale of tickets over the roads by the Pennsylvania Railroad Company. As I stated a little while ago, where a company sells a coupon ticket over its own route *and connecting lines,* there is no particular significance attached to that fact. It sells the ticket then as the agent for the other
338 roads. But the Pennsylvania Railroad Company has an office here in Washington, and it sells tickets from Baltimore to Quantico over the Baltimore and Potomac and other roads, beginning at a point separated from its own road proper, which runs from Philadelphia to Pittsburg, by all of the distance between Baltimore and Philadelphia. It sells tickets from Washington to the South; that is to say, over roads separated by a hundred miles from its road proper. It seems to be very singular that a company should be doing that which had no interest in the business which it was thus managing. It is not like selling over its own road and then over connecting lines; but it acts independently of any such connection, and although it does not work the lines directly in its own name, yet it has an office here and by its agent sells tickets over these roads and receives the money for them, making some division afterwards. That is a very strong fact to go to the jury to indicate some participation in the business of these roads and control over them.

Another quite significant fact was, that the Pennsylvania Railroad Company made a claim on the Washington and Alexandria railroad *for its proportion of damages for the destruction of merchandise in this very collision.* There was an attempted explanation of this, but it was not clearly testified to. There was an intimation that the Pennsylvania Company had assumed some responsibility for the freight on its own lines and then was seeking to reclaim what it had to pay to the other roads. If that had been so, it would be entitled to claim the whole damages from the other road, if they were entirely independent in their business dealings; but that was not the case. It sent a bill to the Washington and Alexandria Railroad Company, *for its proportion* of the damages occasioned by this collision. That implies, of course, that somebody else has to bear a proportion of the loss and that this company, if it paid damages, would have its proportion to pay. That is a somewhat significant fact in the direction of showing joint responsibility, as it appears to us.

Another fact relied upon was, that the mail pay received by the Washington and Alexandria Railway Company from the Govern-

ment was divided up amongst these three roads, and that there was a meeting of the directors of that company authorizing that money to be paid into the hands of Lieb as cotreasurer for all of these companies, and that the meeting took place at the office of the Pennsylvania Railroad Company in Philadelphia.

All of these circumstances were submitted to the jury and we think they are sufficient *prima facie* evidence to go the jury as indicating the identity of the Pennsylvania Railroad Company with the whole combination, as you may express it, or with the Baltimore and Potomac road, and that in fact they were running the Baltimore and Potomac road.

The charge of the justice on that subject is found on pages 271 and 272 of the Record. He says:

"As to the liability of the Pennsylvania Railroad Company, I give you in charge the following prayer of its counsel:

"'In determining the question as to whether or not the Pennsylvania Railroad Company is liable for the injuries complained of in these causes, the jury cannot infer such liabilities from the fact, if the jury should find it to be a fact, that the said defendant was at the time of the accident complained of the owner of the stock or bonds issued by either of the other defendant corporations. (Such ownership cannot be considered as evidence tending to establish or prove such liability.)'

"That is all given except the last sentence. I think that observation would be misleading and would require comment. The fact that they owned the bonds and stock might be, and I think properly, competent evidence to go to the jury in this case. These circumstances are to be considered with all the other circumstances on which the jury are to determine whether or not the Pennsylvania Railroad Company has any such interest in this case as will hold it liable and responsible to the plaintiff.

"Neither will it be sufficient to show in addition that the directory of the Pennsylvania Company and that of the other defendant companies, except the Virginia Midland Company, were composed, to a greater or less extent, of the same, or that some of the officers of the Pennsylvania Company were the same, as in the other defendant companies. In order to find that the Pennsylvania Company is liable in this case, you should find that there was some actual arrangement by which the Pennsylvania Company was interested with the other companies, other than the Midland Company, in running the trains over this road, which the other companies, except the Midland Company, were interested in; or you must be satisfied from the evidence that by reason of some arrangement or condition of things, the Pennsylvania Company had the right as between the parties, as a corporation, to and did issue any order or regulation that it chose to those who were engaged in running
339 trains on the Alexandria and Washington railroad in relation thereto, and that such order and regulation which when made were accepted and obeyed. If satisfied of this by evidence which to your minds establishes the fact by a preponderance of evidence, you will return a verdict against the Pennsylvania Railroad Com-

pany. If you find that those who were operating the trains which met in the collision were guilty of negligence and were the same companies that you find were so subject to the orders and regulations which were made by the Pennsylvania Company, you are not to act upon surmise or suspicion, but evidence direct or circumstantial sufficient to satisfy you of the existence of the facts, and if the evidence fails to establish the necessary facts, your verdict should be for the Pennsylvania Railroad Company. Indeed, it is proper to say here that all facts necessary to be established in order that plaintiff may recover against any of the defendants should be established by a preponderance of the evidence."

It seems to us that the evidence justifies the charge. The facts were sufficient to go to the jury; and if they did find the facts referred to in the charge, the charge correctly expresses the law.

It is, perhaps, not amiss here to remark that all of these circumstances seem, in our judgment, to point to at least the appearance of interest in and control by the Pennsylvania Railroad Company over this business, and that is strengthened by the fact that the defendants have made no effort to explain away what I might call the compromising circumstances. There was nothing easier than for the Pennsylvania Railroad Company and these other companies to show exactly what the arrangement was between them; to show what they got and that it constituted nothing but a division of the gross profits—of the gross fare received either for freight or passengers. But there was not the slightest attempt made to do that, and it seems to us a pretty strong justification for leaving to the jury the evidence which was submitted to them as a basis for their finding.

It was attempted, however, at the trial to show that the Alexandria and Fredericksburg Company were not liable to a verdict in this case, because the road was in the hands of trustees and not in the hands of the company itself. It does appear that the company executed a mortgage to secure $1,000,000 of bonds, and one of the provisions of that mortgage was that upon default the trustees shall, at the request in writing of the holder or holders of said bonds or any part thereof, have the right and power after giving thirty days' notice of such default of the party of the first part in the payment of said interest as aforesaid, or in the payment of the principal sum when the same shall have matured, as aforesaid, to enter and take possession of said Alexandria and Fredericksburg railroad, together with all and singular the franchises, property, estate, equipments, buildings, shops, engines and cars and every species of property, right, title, or interest belonging thereto, in whatever shape the same may exist, and also to take possession of all records, stock books, account books or vouchers for any money due the said company upon any instrument in writing or from any source whatever, or that may be requisite to give information as to the affairs and real condition of said company, and the said trustees or their successors are hereby invested with power to enforce the delivery of the said books, vouchers, and credits or any part thereof. And said trustees, or their successors, may also, at their option, *appoint a re-*

ceiver, auditor, agent or agents, to conduct the affairs of said road or to work the same for the benefit of the holders of said bonds or coupons so overdue or their assigns.

There is a question as to how far the company had the power to execute this mortgage; but assuming for the purposes of the argument that they could execute it, if there had been a foreclosure of the mortgage and the road had legally passed entirely out of control of the company of course they were no longer liable to suit. But as long as the mortgage was not foreclosed the property was in the company, and if they did authorize the trustees named in this mortgage or their successors to enter upon and take possession of this road, and work the road, the latter necessarily did so as the agents for the company, and also for the creditors. The company could not, by putting its road in the hands of agents, whom they call trustees, exonerate themselves from responsibility for working that road. It does not appear, in point of fact here, that the circumstances ever arose which justified the trustees in taking possession; at least it does not appear that there was a default in the payments made, etc., and it does not appear that the trustees had the power under the mortgage to take possession of the road themselves. They were authorized to appoint a receiver to do it. And this was not done. They took possession themselves, and apparently without authority. But either with or without authority they took possession as trustees or agents of the company, and were
340 their agents. The company could not divest itself of its property or responsibility by that operation, in our judgment.

The charge of the court on that point is found on page 264 of the Record. The court says:

"The Alexandria and Fredericksburg Railroad Company also pleads that it was not a common carrier on the road where the accident occurred, in addition to the plea of not guilty, and upon this trial it supports its plea by showing that its road at the time of the accident and for some time before, had been in the possession of trustees, by virtue of the provision of the deed of trust executed by the company to secure its indebtedness, the condition of which had become broken by the maturity and non-payment of the debt so secured. In order that the Alexandria and Fredericksburg Railroad Company may be acquitted of responsibility for this reason, it should, in any event, appear that, in fact, the business of management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers and board of directors, and that it was so notoriously so that it may well be presumed to be known to the public.

Besides, it should appear that the trustees were not appointed by the procuration or assent of the railroad company; for if so, the trustees would be as much the agents of the company as the grantees in the trust deed. The supreme court of appeals of the State of Virginia, in an action brought against the Alexandria and Fredericksburg Railroad Company for personal injuries resulting from negligence on the road while in the possession of trustees, by

virtue of the deed of trust, under conditions precisely similar to those shown in this case, held that: "No provision is found in the charter of the defendant company or the general railroad law of Virginia, which will authorize the company to transfer to trustees or to mortgagees under the deed of trust given as a mere incumbrance and security, the right and legal capacity to step into the shoes of the company and assume and exercise indefinitely the franchises, rights and privileges of the company, so as to give the company exemption and immunity from responsibility for all injuries inflicted by the operation of the road by the trustees." I quote this language for accuracy and convenience and adopt it and give it to you as the law in this case. It follows that the Alexandria and Fredericksburg Company cannot be excused from liability because of any possession shown in the trustees."

In this case, too, we think the court was right, and we will refer in that connection also to the case of Thomas *vs.* The Railroad Company, 101 U. S., page 71; Pennsylvania R. R. Co. *vs.* The St. Louis, &c., R. R. Co., 118 U. S., 90, and Oregon R. R. Co. *vs.* Oregon, &c., 130 U. S., 110.

It is claimed on behalf of the Alexandria and Washington road that it was in the hands of a receiver, and that it had no control over its own road, and should not be held responsible for anything that occurred upon the road. On this subject the charge of the court was:

"If you find from the evidence that the Washington and Alexandria Railroad Company was carrying United States mail between Alexandria and Washington, and the plaintiffs were in charge thereof as postal clerks, duly commissioned and designated by the United States for that duty, and the Alexandria and Washington Railroad Company was paid by the United States by draft payable to the order of the agent of said company, appointed by its board of directors to receive the same, and that the freight and passenger trains which collided and caused the injury to plaintiffs were running over said road in pursuance of arrangements made by the parties in control of said road, prior to the appointment of the receiver of said road, and if, when the receiver was appointed, he continued in office as superintendent, general manager and treasurer, the same persons as had heretofore discharged the duties of these positions, and if the business of this railroad, so far as was known to the public, was continued in the same way, so far as the general public could know, as before, and was so conducted at the time of the accident, and that the only substantial duty that the receiver discharged was to receive the net earnings of the road from the treasurer and to account therefor to the court, by which he was appointed; and if you shall find that the Alexandria and Washington railroad is guilty of negligence from the evidence and under the instructions of the court, your verdict will be against them for the plaintiff. But if you are satisfied that the business of the Alexandria and Washington railroad, so far as the Alexandria and Washington Railroad Company's interest was concerned, was conducted by the receiver after his appointment and at the time of the

collision in question, in his own name and in such manner that it could be generally known by the public that he, and not the company, conducted the business and controlled the road and its management, and that he did so to the entire exclusion of any control or participation therein by the Alexandria and Washington
341 Railroad Company, its officers and board of directors, then your verdict should be for the Washington and Alexandria Railroad Company."

The evidence in this case tended to show that the only duty discharged by the receiver, after going through the formality of sanctioning the appointments already existing of persons in the control of the business of that road, consisted in receiving the net earnings of that company, and that he took no personal part whatever in the management of the company; that the management was continued in the parties who had been in the management of the road in pursuance of the arrangement between these three roads, of which I have already spoken.

It seems to us that under these circumstances, and that state of the evidence left to the jury, the charge was correct.

The case of The Railroad Company *vs.* Brown, 17 Wallace, 445, appears to sanction this. That was an action against a railroad company which had passed into the hands of a receiver, and the court said:

"The second assignment of error denies the liability of the corporation for anything done while the road is operated by the lessees and receiver. It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its rights into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public.

"It is argued, however, that this rule is not applicable where the proceeding instead of being voluntary is compulsory, as in the case of a transfer of a possession to a receiver by the decree of a court of competent jurisdiction.

"Whether this be so or not, we are not called upon to decide, because it has never been held that the company is relieved from liability unless the possession of the receiver is exclusive and the servants of the road wholly employed and controlled by him.

"In this case the possession was not exclusive nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of; and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver.

"Apart from this view of the subject, the ticket on which the plaintiff rode was issued in the name of the Washington, Georgetown and Alexandria Railroad Company, as were all tickets sold at both ends of the route. The holder of such a ticket contracts for

carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Catherine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. *She is not required to look beyond the ticket, which conveyed the information that this road was running, as railroads generally are, by a chartered company. Besides the company having permitted the lessees and receiver to conduct the business of the road in this particular, as if there was no change of possession, is not in a position to raise any question as to its liability for their acts.*"

That part which I last read is important as bearing upon the objection I noted a little while ago, to the feature in the charge which attaches some importance to the circumstance that the public did not know of the change in the condition of these companies, with reference to the appointment of trustees and receivers.

On the facts testified to, if the jury believed them, we are of the opinion that the court was correct in its charge in this respect, and that the company did not cease to be liable by virtue of the fact that a nominal receiver was in receipt of the net income that belonged to the Alexandria and Washington Railroad Company.

This covers the substance of the charge and the facts as applicable to these three companies. The exceptions may be classified thus:

First. The first twenty-six bills of exceptions, as I remember, were to the admission of evidence offered on the part of the plaintiff, with perhaps one exception, and all of that evidence related to the particular facts and circumstances that I have referred to, and which we considered as having gone properly to the jury.

It might be remarked here that the court is really not bound to consider any of these exceptions because in not a single instance is any reason assigned for the objection made, and the Supreme Court has lately characterized that as an improper practice in the case of Woodbury *vs.* The District of Columbia. But we have taken the trouble to examine every one of these exceptions in detail and it does not seem to us that any of them are well founded, as to the admissibility of various items of evidence offered by the plaintiff.

There is one exception, and that is the refusal of the court to
342 admit evidence on cross-examination of one of the plaintiff's witnesses which probably ought to have been admitted. It looks, on its face, as if there were error there. On the examination of the plaintiff's witness, a question was asked as to the duties of certain officers, and why certain officers were employed by the different companies. But it does not appear that anything was lost by this to the defendants. It was a part of their case, and they might have called some witness or any number of witnesses as to the same facts. It was open to them in that stage of the case to offer evidence for that purpose. We do not see, therefore, that any harm was done to them by the exclusion of this evidence.

Then there are some questions on the refusal to admit parol evidence with regard to subjects in relation to the right of way and other questions of that sort, which we think were better established

by the printed regulations of the company. We do not think those objections well founded.

After that follows a series of exceptions to the prayers. Some of these prayers are already embodied in the charges of the court, and there is, therefore, no ground of objection on that score. The other instructions that were asked come in direct conflict with the charge in those very particulars, in which we are of opinion that the charge is correct, and therefore they must be overruled, all of them.

The last group or class consists simply of exceptions to separate parts of the charge, which as a whole we approve, and therefore it is not necessary to go into any detail as to them.

Therefore, upon the whole, we do not find any errors in the rulings of the court below that *was* of any prejudice to the defendant-, and the motion for a new trial on bills of exceptions is overruled.

At the close of the testimony there is a general prayer that the plaintiff is not entitled to recover upon the whole evidence; but as we consider that evidence all proper to go to the jury, it follows that the exception could not be sustained.

The judgment of the court below is affirmed.

The foregoing is a corrected stenographic report of the opinion of the general term as delivered by me.

W. S. COX.

343 *Bond for Writ of Error. Filed July* 30, 1890.

In the Supreme Court of the District of Columbia, the 30th Day of of July, 1890.

CHARLES T. STEWART, Plaintiff, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND POTOMAC RAILROAD COMPANY, THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, AND THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, Defendants, and JOHN CASSELS.	At Law. No. 26303. In Error.

Know all men by these presents that we, The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, The Alexandria and Washington Railroad Company, and John Cassels, principals, and J. Donald Cameron, surety, are bound unto the above-named Charles T. Stewart in the sum of thirty thousand dollars ($30,000.00), to be paid to the said Charles T. Stewart, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 29th day of July, 1890.

Whereas the above-named The Pennsylvania Railroad Company,

The Baltimore and Potomac Railroad Company, The Alex-
344 andria and Fredericksburg Railway Company, The Alexandria and Washington Railroad Company, and John Cassels have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the abovenamed The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, The Alexandria and Washington Railroad Company, and John Cassels shall prosecute their said writ of error to effect and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY, [SEAL.]
THE BALTIMORE AND POTOMAC RAILROAD COMPANY, [SEAL.]
THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, [SEAL.]
THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, [SEAL.]
By E. TOTTEN, *Att'y-in-fact.*
JOHN CASSELS. [SEAL.]
J. D. CAMERON. [SEAL.]

Sealed and delivered in presence of—
—— ——.

Approved.
July 30th, 1890.
A. B. HAGNER.

345 *Writ of Error to the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Charles T. Stewart, plaintiff, and The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, The Alexandria and Washington Railroad Company, defendants, and John Cassels, a manifest error hath happened, to the great damage of the said defendants and John Cassels, as by their complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the

record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 30th day of July, in the year of our Lord 1890, and of the Independence of the United States the one hundred and fifteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

Allowed.
A. B. HAGNER, *Justice.*

July 30, '90.

346 *Citation to the Supreme Court of the United States.*

The United States of America to Charles T. Stewart, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The Pennsylvania Railroad Company, The Baltimore and Potomac Railroad Company, The Alexandria and Fredericksburg Railway Company, The Alexandria and Washington Railroad Company, and John Cassels are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Honorable A. B. Hagner, associate justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety.

July 30, 1890.

A. B. HAGNER,
Associate Justice.

Service accepted July 31st, 1890.

WILLIAM A. COOK,
C. C. COLE,
Att'ys for Charles T. Stewart.

347 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 1st day of August, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Assistant Clerk*.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 1st day of August, 1890.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 1st day of August, 1890.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Assistant Clerk*.

[Endorsed:] Authentication of record.

Endorsed on cover: Case No. 14,284. District of Columbia supreme court. No. 261. The Pennsylvania Railroad Company, The Baltimore & Potomac Railroad Company, The Alexandria & Fredericksburg Railway Company, The Alexandria & Washington Railroad Company, and John Cassels, plaintiffs in error, *vs.* Charles T. Stewart. Filed October 14, 1890.

Office Supreme Court U.
FILED.
APR 6 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE & POTOMAC RAILROAD COMPANY, THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, AND JOHN CASSELS, PLAINTIFFS IN ERROR,

v.

THOMAS W. JONES,

No. 260.

AND

THE SAME PLAINTIFFS IN ERROR

v.

CHARLES T. STEWART.

No. 261.

BRIEF FOR PLAINTIFFS IN ERROR.

ENOCH TOTTEN,
For Plaintiffs in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE & POTOMAC RAILROAD COMPANY, THE ALEXANDRIA AND FREDERICKSBURG RAILWAY COMPANY, THE ALEXANDRIA AND WASHINGTON RAILROAD COMPANY, AND JOHN CASSELS, PLAINTIFFS IN ERROR,

v.

THOMAS W. JONES,

No. 260.

AND

THE SAME PLAINTIFFS IN ERROR

v.

CHARLES T. STEWART.

No. 261.

BRIEF FOR PLAINTIFFS IN ERROR.

The importance to the commerce of the whole country of the questions involved in these two causes and the impossi-

bility of an oral argument in behalf of the plaintiffs in error at this term, is the apology offered for so voluminous a brief.

Five railroad companies were made defendants in each of these actions, when but two, at the utmost, should have been joined, and one of these five defendants owns not a foot of railroad track within an hundred miles of the place of the accident. Of course it is to the advantage of the plaintiffs to join as many railroad companies as defendants as possible, because, first, the greater the number, the greater the verdict, and, second, the greater the number of such defendants, the greater the mass and the less definite the character of the evidence and the wider the range of the jury. It is for the advantage of the plaintiff and to the disadvantage of the defendants in every way to swell the number of the defendant companies to the greatest extent possible.

These two causes were consolidated and consumed a long time in the trial, which began on the 8th of April (16), and the verdict was rendered on the first day of May following.

Statement of the Case.

The cause of action alleged in these two cases is, briefly, that the defendants in error were employed in the postal service of the United States as postal clerks, on a route between Charlotte, N. C., and Washington, D. C., and while in a postal car of the defendants, on the 19th of February, 1885, in the discharge of their duties, were injured in a collision which occurred at that time at Four-Mile Run, between Alexandria and Washington, and between an Alexandria and Fredericksburg fast freight train going south and a Virginia Midland passenger train going north, whereby they suffered damage to the extent of $25,000 each.

The plaintiff in error the Pennsylvania Railroad Company is a corporation chartered by and existing under the laws of the State of Pennsylvania and is engaged in transporting freight and passengers between Pittsburg and Philadelphia and in that State.

The Baltimore and Potomac Railroad Company is a corporation organized under the laws of the State of Maryland and the acts of Congress of the United States, and is engaged in transporting persons and property between Baltimore and Washington, D. C.

The Virginia Midland Railway Company is a corporation organized under the laws of the State of Virginia, and was engaged in transporting persons and property between Washington, D. C., and Alexandria, Virginia, and Danville in the same State.

The Alexandria and Washington Railroad Company is a corporation owning a track or tracks between Alexandria and the south end of Long Bridge, Virginia, which did no transportation business, but, being insolvent, was in the hands of a receiver, appointed by the circuit court of the United States for the eastern district of Virginia, and by whom the same was managed and controlled.

The Alexandria and Fredericksburg Railway Company, is a Virginia corporation, extending south from St. Asaph's junction, near Alexandria, Virginia, to Fredericksburg, in the same State, which, also, being insolvent, was in the hands of and operated by trustees in possession under a provision of a trust deed to secure the indebtedness of the said company.

The tracks of neither of the defendant corporations, except the Alexandria and Washington, extended over the place where the collision occurred and the colliding trains were the trains of the Virginia Midland and the Alexandria and Fredericksburg Railway Companies, each of which

companies had the right—under existing separate contracts with the receiver of the Alexandria and Washington road—to run its trains over the track of the A. & W. road, where the collision occurred. The plaintiffs below allege that the postal car on the north-bound Virginia Midland passenger train "was run into by the Alexandria and Fredericksburg fast freight train;" and they allege, in respect to the business carried on, that "the said defendants were engaged as common carriers in the transportation of passengers, persons, and freight upon and along the several lines of railroad belonging to said companies and, among others, along the line of the railroad of said Alexandria and Washington Railway Company, running between Washington and Alexandria under agreement or contract for their common benefit."

The pleas of the defendants below denied all the allegations of the declarations, and also denied specially that any such arrangement for a joint business for a common benefit existed.

The two causes were tried together before a jury, in the court below, at the January term, 1889, and a separate verdict entered as follows: For the plaintiff Thomas W. Jones, in No. 26,298, against all the defendants except the Virginia Midland Railway Company, for $10,000, and in favor of the plaintiff Charles T. Stewart, in No. 26,303, against all the defendants except the Virginia Midland, for $15,000

The defendant companies, as carriers, being liable at common law for injuries suffered by persons or property during the carriage by them, but only to the end of the route, and liable as forwarders only when they had entered into contracts with the connecting roads to transport persons and property beyond the end of their respective routes, plaintiffs in these cases undertook to establish the liability of all the

companies without proof that the injury occurred on the road of the respective companies, and without establishing the existence of a contract to receive and forward beyond the end of their respective roads, and without any proof of any special agreement extending the companies' common law liability, but simply by showing a number of separate acts done separately by some or all of the defendants, which did not together or separately prove, or tend to prove, an undertaking between the companies to extend the liability of one or all of them beyond the recognized common law liability referred to above—acts harmless in themselves, convenient in the transaction of a through business and from which, though incompetent for that purpose, the jury inferred a common liability against all of the companies except the Virginia Midland.

Primarily, the injury was caused by the act of the Virginia Midland and the Alexandria and Fredericksburg jointly, or by one of them separately.

This, however, was changed by allowing in evidence facts and circumstances as against all, which always do and must, as a matter of convenience, exist when several roads are operating together, each doing its own business, for its own benefit, but connecting and together constituting an extensive through line.

The Pennsylvania Railroad Company, as a corporation, did no business south of Philadelphia, the territory from Philadelphia to Baltimore being covered by the Philadelphia, Wilmington and Baltimore Railroad Company; the territory between Baltimore and Washington by the Baltimore and Potomac; the territory between Long Bridge and Alexandria by the Alexandria and Washington Railroad, but the mail route on which the accident occurred terminated at Washington.

The declaration omitted the Philadelphia, Wilmington

and Baltimore, but included the Pennsylvania Railroad Company.

It was proved that the road of the Pennsylvania Railroad Company did not extend south of Philadelphia by Mr. Parke, who was employed by that company, whose office was in Washington, and whose duty it was to look after western business and see that tickets were for sale at all railroad offices. He had his office in the Baltimore and Potomac depot, and it appears that at the ticket office of the Pennsylvania Railroad Company in this city its agents sold tickets east, west, north, and south.

It was also proved that James R. Wood was passenger agent; that Charles E. Pugh was general manager; that Leib was local treasurer, and that these persons performed the same services for the Philadelphia, Wilmington and Baltimore, the Baltimore and Potomac, Alexandria and Washington, and the Alexandria and Fredericksburg Companies; keeping, however, separate accounts for each, and that method of doing business was resorted to because it was much less expensive than having separate corps of officers for each of the roads.

Wood was also the general passenger agent of the New Jersey and Camden, the Atlantic and West Jersey and the Northern Central Railroads.

Mr. Pugh was also agent of the Northern Central and the Philadelphia and Erie.

The mail was carried between Alexandria and Washington, D. C., and the Treasury drafts, issued in payment for the same, were paid to Leib and divided among the different roads over which it was carried, according to distance.

An advertisement was given in evidence, signed by Wood, headed:

The Great Pennsylvania Route to the Northwest and Southwest.

Double track, splendid scenery, steel rails, magnificent equipment.

Trains leave Washington from station corner Sixth and B streets.

For Pittsburg and West.

Baltimore and Potomac Railroad for Erie, Canandaigua, Rochester, Niagara, Williamsport, Lock Haven, Elmira.

For New York and the East.

For Boston.

For Brooklyn.

For Philadelphia.

For Pope's Creek Line.

For Annapolis.

Alexandria and Fredericksburg Railway, and Alexandria and Washington Railway.

For Alexandria.

For Richmond and the South.

(Signed) CHAS. E. PUGH,
General Manager.
J. R. WOOD,
General Passenger Agent.

It was further given in evidence that the pay-car, from which pay-rolls were paid, was in charge of a conductor and brakeman who had "a uniform on like all the men in the employment of the Pennsylvania Railroad—a blue suit with silver buttons."

That a printing bill against the Fredericksburg Railway, "J. N. Dubarry and John T. Green, trustees," was delivered at the Baltimore and Potomac station, Washington, and paid by J. S. Leib.

Pay-rolls for labor on the Alexandria and Fredericksburg, and the Baltimore and Potomac, were paid by J. S. Leib, local treasurer.

Annual reports to the stockholders of the Pennsylvania

Railroad Company were put in evidence, and the following quotations therefrom were relied upon:

From the report of March 2, 1885, for the year 1884:

> "The Board herewith submits their report for 1884 with such data relating to *the lines controlled by your company* as will give you a clear understanding of their physical and financial condition."

And also this quotation therefrom:

> "The Baltimore and Potomac Railroad *connects your line* with Washington and the South."

Quotations were put in evidence from the third annual report, March 10, 1885, giving a list of the officers and directors of the Pennsylvania Railroad Company and showing that some of those individuals were also officers of the Baltimore and Potomac and Alexandria and Fredericksburg Companies. Quotations were also put in evidence from the report of March, 1886, as follows:

> "The Board herewith submits its report for the year 1885, with such data as relates to *the lines embraced in your system* as will give you a clear understanding of their physical and financial condition."

It was also shown by said report that the Pennsylvania Railroad Company owned on the 31st of December, 1885, $1,000,000 of the bonds of the Alexandria and Fredericksburg Railway Company, and $2,000,000 of the bonds of the Baltimore and Potomac Railroad Company. That the Pennsylvania Railroad Company owned, as appeared by said report, 60,852 shares of the Baltimore and Potomac Railroad Company's capital stock, and 217,819 shares of the stock of the Philadelphia, Wilmington and Baltimore Railroad.

A railroad map was also put in evidence showing a con-

tinuous line of road thereon, colored yellow, between Philadelphia and Quantico, and the initial letters marked thereon showed that the roads embraced therein were the Philadelphia Wilmington and Baltimore, the Baltimore and Potomac, and the Alexandria and Washington and the Alexandria and Fredericksburg.

A ticket (144) was produced, and it was proved that it was issued by the Pennsylvania Railroad Company, and that it was sold in Baltimore, in the office of the Northern Central R.R. Co., on account of the Alexandria and Fredericksburg Railway Company.

It was also proved that a report was made to the State of Virginia by the Alexandria and Washington, and Alexandria and Fredericksburg Companies, and from these reports a consolidated report was published by the State. Such consolidated report was put in evidence, to show that the Pennsylvania Railroad Company owned stock, and that some of its officers were officers of these roads.

It was substantially upon this testimony that the joint liability was attempted to be established "in the absence of a special agreement to that effect," and the case rested exclusively on inferences to be drawn from these doubtful expressions and loose language with no clear and satisfactory evidence to support it, and all of which evidence was duly excepted to and proper bills of exceptions taken.

After the plaintiffs below had closed their testimony, the defendants requested and moved the court to instruct the jury to return a verdict for the defendants, and a similar motion was at the same time made in favor of each of the defendants separately; all of said motions were, however, overruled and denied. Whereupon, and at the close of all the testimony for the plaintiffs and the defendants, the same motion was made as to all the defendant companies

(now plaintiffs in error) and as to each of them separately, which motions were also overruled and denied and exceptions duly taken.

As to the Alexandria and Washington road, and the Alexandria and Fredericksburg, there were in addition to the defences before mentioned, special grounds of defence as to them, respectively, the facts on which the same rested being fully proved, and, indeed, not controverted, for they were such matters of record as could not be controverted. They were as follows:

The A. & W. Road being insolvent, a creditor's bill was filed in the circuit court of the United States for the eastern district of Virginia, and a decree was entered therein on the 19th of January, 1882 (131), placing the road in the hands of a receiver, who thereupon took possession of all its property, rights, and franchises, and was in exclusive possession (133) at the time of the collision and operating the road as it was operated when the collision took place, and who continued so to operate it until the sale of the road in July, 1887, two years after the collision, during which time the corporation, the Alexandria and Washington Company, neither had any right to control, or did in fact exercise any control whatever in the management of the said road, and as to which matter the defendants asked the court to instruct the jury that the plaintiffs could not recover as against that corporation, which prayer was refused and the said defence was denied that corporation, to which ruling and refusal to give that instruction, the defendants seasonably excepted, and said exceptions constitute part of the bill of exceptions in this case.

As to the Alexandria and Fredericksburg Railway Company, it was proved and not denied, that long prior to the collision that road being indebted in the sum of one million of dollars, covered by its first bonds, executed a deed of trust

upon all the property of the road, including the franchise, to secure the same, which deed of trust empowered the trustees in case of default in payment to take possession, manage the road, and, if necessary, to sell it. That said trustees did take possession, manage, and run the road, and had been doing so since December 6, 1872, openly and notoriously. That the contracts and pay accounts were all signed and were in the name of the "Alexandria and Fredericksburg Railway Company, J. N. DuBarry and John Green, trustees" (p. 84, 85, 86, 95, and 98); and as to which matters the defendants asked the court to instruct the jury that the plaintiffs could not recover against that corporation, which prayer was refused, and the said defence was denied to that corporation, to which ruling and refusal to give said instruction, the defendants seasonably excepted, and said exception constitutes part of the bill of exceptions in this case. The chief justice presiding, on the contrary, instructed the jury that the charter of the company did not authorize the company to execute a deed of trust with power in case of default to enter into possession and run the road, and that the company was therefore liable.

The errors complained of consist, as the defendants below contended, in allowing incompetent testimony to be received, in rejecting competent testimony offered by the defendants, in refusing requests for instructions made by the defendants, and in giving a charge to the jury, which did not correctly state the law and did not state the whole law necessarily involved in the case, as requested by the defendants.

Assignment of Errors.

The court below, on the trial of this cause, erred as follows, to wit:

By refusing to instruct the jury, at the close of the

testimony, to render a verdict in favor of the defendant companies (excepting the Virginia Midland Co.)

By admitting incompetent evidence to the jury, and in rejecting evidence offered by the defendant companies (now plaintiffs in error), as specially pointed out in this brief.

By refusing to grant the instructions asked in behalf of defendants, now plaintiffs in error (see pp. 187 to 197).

By refusing to give the instruction asked for by the counsel for the defendants (now plaintiffs in error) as set out in the 32d exception (187), and by giving the instruction, to the contrary effect, as embodied in the 60th exception (210), which prayer related to the automatic electric signals.

By prohibiting the defendants from asking proper questions on cross-examination, as set forth in the 11th exception (78, 79).

By instructing the jury, as the court did, as appears by the 58th exception (p. 209), that the north-bound passenger train had the right to the track, at the time of the accident, as against the south-bound freight, notwithstanding the provisions of rule No. 90 (209, 40, 44, 45).

By directing the jury, in the absence of evidence on the point, to inquire whether or not the Pennsylvania Railroad Company had a right to and did issue orders and regulations to govern the Alexandria and Washington Railroad, as appears from the 63d exception (212).

By instructing the jury against the defendant companies (now plaintiffs in error) in the manner set forth and appearing from the bills of exception, numbered from 51 to 63, inclusive (pp. 205, 212).

Points and Authorities.

The defendants maintain—

That a railroad company, as a common carrier of per-

sons and property, is only liable for safe carriage over its own line, and if the road connects with other roads, and persons or property are received for transportation beyond the termination of its own line, there is added to the duty of the carrier only the duty of forwarding—that is, to deliver safely to the next carrier in the route. That the common law imposes no greater duty than this. If more is expected from the company, there must be a special agreement for it:

> "Each road confining itself to its common law liability is only bound in the absence of special contract to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liabilities shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."
>
> *Croft* v. *R.R. Co.*, 1 MacArthur, 492.
>
> *Myrick* v. *Mich. Cent. R.R. Co.*, 107 U. S. 102; see pp. 106 and 107.
>
> *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 324.
>
> *Railroad Co.* v. *Pratt*, 22 Wall. 123.
>
> *Insurance Co.* v. *Railroad Co.*, 104 U. S. 146.

An arrangement, entered into, by which different companies undertake to establish a through line, covering several roads, forming and constituting a continuous connected line, each company bearing the general expenses of its own line and of all transportation over it, the division of earnings being made only on the basis of distance carried by each line, and the accounts as to such through business being kept by one set of officers, acting for all the roads, but there being no sharing of losses and profits between

the roads, and no holding themselves out to the public as partners, is an arrangement of simple convenience and economy and does not involve a joint liability or make the roads partners either *inter sese* or as to third persons.

Insurance Co. v. *Railroad Co.*, 104 U. S. 146–158.
1st Morawitz on Private Corporations, § 377.
Croft v. *R.R. Co.*, 1 MacA. 492.
Phifer v. *R.R.*, 86 N. C. 311.
Knott v. *R.R.*, 98 N. C. 73.
Phillips v. *R.R.*, 78 N. C. 294.
Lindley v. *R.R.*, 88 N. C. 547.
Falvey v. *R.R.*, 76 Ga. 597.
Ortt v. *R.R.*, 36 Minn. 396.
Burroughs v. *R.R.*, 100 Mass. 27.
Hadd v. *Ex. Co.*, 52 Vt. 3351.
Root v. *R.R.*, 45 N. Y. 524.

See the authorities on this point collected in 3 Wood's Railway Law, p. 1572, note 3.

The supreme court of Illinois declared (in *Peoria R.R. Co.* v. *C. R. I. R.R. Co.*, 109 Illinois, 135) that:

> "It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such it would be difficult, if indeed, it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and reshipped in cars of the connecting carriers. That would occasion more delay than the necessities of commerce would tolerate."

It was not contended on the trial that there was an actual

agreement to incur a joint liability or that there was a co-partnership in fact, such as is referred to in the foregoing propositions, but if the common-law liability of the roads was changed, it was because an intention to change it was to be inferred from the nature of the transaction and the manner in which the business was done.

We have important legislation bearing on this question. The act of Congress of June 15, 1866 (14 Stat. 66), provides as follows, to wit:

> "Every railroad company in the United States, whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its roads, boats, bridges, and ferries, all passengers, troops, Government supplies, mails, freight, and property on their way from any state to another State, and to receive compensation therefor, *and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination*. This same provision is found in section 5258 R. S."

This court, construing this statute, declared that it was "intended to facilitate commercial intercourse among the States," and also that "it is of great public interest that such intercourse should be free and untrammelled." (*R.R. Co.* vs *Richmond*, 18 Wall. 590).

The act of Congress approved June 21, 1870 (16 Stat. 161), authorizing the B. and P. R. R. Co. to take possession of and reconstruct and use the "Long Bridge," authorizes the company to extend its "lateral branch" over that bridge and to connect its tracks with "any railroads constructed, or that may hereafter be constructed, in the State of Virginia." The act contains this proviso:

> "That said railroad company shall give other railroad companies the right to pass over said bridge

upon such reasonable terms as may be agreed upon or Congress prescribe."

The charter of the Alexandria and Washington Railroad Company, granted by the State of Virginia (see R. 104), authorizes that company to bridge the Potomac river "or to connect with the bridge of any railroad company that may have been or may hereafter be chartered by the Congress of the United States, whose road passes or shall pass through the District of Columbia."

If the doctrine asserted and enforced by the trial justice in these two causes, that where railroad companies conduct a transportation business over continuous lines, and make a *pro rata* division of the compensation received therefor, according to the mileage of each, it creates a joint liaibility on all the companies for *all accidents which may happen on either of the lines during the continuance of such business*, be correct, it is very difficult to perceive how such arrangements for continuous lines can render commercial intercourse more "free and untrammelled." A short line in Maine shipping ice to Texas, or in Texas shipping live cattle to Maine, would be liable for all damages resulting from negligence on any of the lines forming part of the continuous line. Such a responsibility would be fatal to any railroad company in the United States.

We maintain that there was a mass of irrelevant and incompetent evidence improperly given to the jury, which, while it did not either establish or tend to establish a joint liability, was calculated to, and did in fact, mislead the jury.

Those several matters are presented and embraced in the following exceptions to the receiving and rejection of proof, to wit:

Exception	No.	3,	page	73;	No.	4,	page	73;
"	"	8,	"	76;	"	9,	"	77;
"	"	10,	"	78;	"	11,	"	79;
"	"	12,	"	81;	"	13,	"	81;
"	"	14,	"	83;	"	17,	"	140;
"	"	18,	"	143;	"	19,	"	144;
"	"	20,	"	145;	"	21,	"	146:
"	"	22,	"	150;	"	23,	"	152;
"	"	24,	"	169;	"	45,	"	194;
"	"	50,	"	197;	"	56,	"	208;
"	"	62,	"	211.				

John H. Bruce, having been called, was asked what authority did he, Sharpe, have or exercise in relation to those roads, to wit, meaning the Baltimore and Potomac, Alexandria and Fredericksburg, and Alexandria and Washington, to which he answered: "He, Sharpe, had charge of all the trainmen that were employed there" (page 73).

The same witness was asked, "What, if anything, did Mr. Sharpe ever tell you about these signals?" to which he answered that on several occasions, when there was anything wrong with them, he used to notify him or send him a paper (page 73). From this evidence the jury was expected to infer that the signals were not in working condition on the night of the accident, and also that Sharpe was the agent of all the defendant companies except the Virginia Midland Company.

These matters constitute the 3d and 4th exceptions. Sharpe being in the employ of the Baltimore and Potomac Railroad Company, having his office in the B-street depot, Washington, this witness was thus allowed to make him the agent of those roads and extend his jurisdiction away from the depot to the signals between the south end of Long Bridge and Alexandria. Not only was he permitted to do this, but

he was allowed to testify to the authority of an officer of the road, concerning which he could have had no personal knowledge, and to testify also as to the authority exercised, without giving the date thereof, or any order or direction which amounted to an exercise of authority. He simply told the witness at some time, that the wires were out of order.

The nature of Sharpe's employment and how his wages were paid appear in the testimony of Wilkins (page 174). He was, the witness says, a subordinate of the superintendent. He was the "train master." "He was employed by the Baltimore and Potomac Railroad, and also by the A. & W.; that is to say, the Alexandria and Fredericksburg and the Alexandria and Washington paid him a portion of his salary." There was, then, no community in losses or profits, but for purposes of economy he was employed to do certain services for each of the roads and paid separately by each for what he did for each.

The 8th exception (page 76) relates to an order of the B. & P. R.R., April 21, 1875, authorizing John S. Leib, agent of that company, to collect from the United States money due for the transportation of the mail on that road, which was read in evidence.

The objection to that piece of evidence was that the mail route upon which the accident occurred terminated on the north at Washington, while the route referred to in the order was between Washington and Baltimore, and the order related to a period ten years before the collision.

The 9th exception related to the same general subject, but the order offered there was an order of the Alexandria and Washington Railroad, dated November 27, 1876, authorizing the same John S. Leib to receive from the United States money due for mail transportation between Washington and Alexandria (page 76).

This order was dated nine years before the collision, and six years before the road passed into the hands of the receiver, and could not tend to show how the business was done in 1885. The object of the testimony referred to in these two exceptions was that the jury might draw the inference that the three roads were copartners. The testimony, however, had no such tendency, not only because the drafts were too long antecedent to entitle them to have any effect or tendency whatsoever, but because these post-office claims were collected by one person, and the share of all the roads was distributed to each of them, respectively, as a mere matter of convenience and economy.

That matter is fully explained by the receiver, Wilkins, in his testimony at pages 180 and 181, which is made part of the 23d and 24th exceptions. See page 150 *et seq.*; where he says (page 181), in speaking of the money obtained for that mail service:

> "The Baltimore and Potomac was paid according to its track, its mileage, and the Alexandria and Fredericksburg according to its, and the Alexandria and Washington according to its."

The same witness, after saying that he was appointed, January 19, 1882, receiver of the Alexandria and Washington Company, and that said road had no cars, engines, or rolling-stock, said that he, as receiver, continued the arrangement with the Virginia Midland road, the Baltimore and Potomac, and with DuBarry and Green, trustees of the Alexandria and Fredericksburg, testified as follows: "Said companies paid the receiver for the use of the track of the Alexandria and Washington * * * on the trackage basis, and that the receipts from the business done over the line of said railroad by the Baltimore and Potomac and the trustees were divided amongst them on the *pro rata* basis, each

receiving the same proportion thereof as the miles of track of each road sustained to the whole number of miles over which the business was done; * * * that after the receiver took possession the gross receipts of the road went into the hands of J. S. Leib, treasurer of the three roads, and the net proceeds were distributed *pro rata* by the common auditor, and the receiver received the *pro rata* share of the Alexandria and Washington road.

He also said that on taking possession of the road he, as receiver, appointed Pugh, Carter, and other agents, who managed the business of the road, and that he settled his accounts in his name as receiver, and that such agents and officers were so selected and appointed by him because it was more economical to use these agents, who were also agents of the Baltimore and Potomac and of the trustees of the Alexandria and Fredericksburg, than to appoint a staff of officers not appointed by the other companies and the said trustees (see page 137); thus showing that the business was done in the very way which renders each of the roads liable only separately for its own acts and not jointly, when each takes its own earnings and there is no sharing in profits or losses with the other roads.

The same witness (for the plaintiff) having, on his direct examination by the plaintiff, testified that J. R. Wood was the general passenger agent of the Pennsylvania Railroad Company; that Charles E. Pugh was general manager and John S. Leib was the treasurer, and that the same persons performed similar duties for the Baltimore and Potomac, the trustees of the Alexandria and Fredericksburg, and the receiver of the Alexandria and Washington, was asked on cross-examination how or by what arrangement these persons came to act in these offices for the other roads; and the same witness, having further

testified in behalf of the plaintiff that Wood was general passenger agent, he was asked by the defendants, on cross-examination, of what roads, and answered, Pennsylvania Railroad; Northern Central; Philadelphia, Wilmington and Baltimore, and the Baltimore and Potomac; and the same witness, having testified for the plaintiff that Wood was general passenger agent, was asked by the defendants, "What were his duties?"

The plaintiff objected to each of the said three questions and to the answers as far as he answered, which objections were each sustained, which matters constitute the subject of the 11th exception (78).

The purpose for which this testimony as to Wood, Pugh, and Leib, acting for the several roads, was introduced by the plaintiffs was to establish facts from which an inference could be drawn, that the three roads were jointly liable as partners, or otherwise, and the defendants had manifestly the right to inquire and put before the jury the real arrangement under which these persons were severally so employed, and to know what their respective duties were, for the plain reason that the inference to be drawn from such employment would be controlled wholly by these facts.

Indeed, nothing could be more material in that direction than the very information asked for by the defendants and prohibited by the court.

The court in general term, in its opinion (232), considers that this was an erroneous exclusion of evidence, and therefore an error. But that court concluded that no harm was done the defendant companies who sought this evidence on cross-examination for this remarkable reason. Says the court: "It was a part of their case, and they might have called some witness or any number of witnesses as to the same facts. It was open to them in that stage of the case to offer evidence for that purpose." This seems to be an

easy way for an appellate court to avoid the consequences of a plain error committed by a trial court. The questions were clearly proper questions on cross-examination and were distinctly responsive to the answers to the direct examination made by the plaintiffs. The defendants had a right to assume that the opinion of the trial justice was that the evidence sought to be drawn out by this cross-interrogation was improper and inadmissible for some reason, and they were not bound to call witnesses and attempt to get it before the jury indirectly. It was plainly error to prohibit the inquiry, and it is no answer to say that the defendants might have attempted to prove the facts in some other way. The defendants had the right to assume that the trial justice was in earnest.

The 12th, 13th, and 14th exceptions are of the same general character as all of the exceptions heretofore considered except the 11th.

An advertisement was put in evidence, which will be found at pages 79 and 80 of the record, and forms the subject of the 12th exception. It will be noticed that this advertisement is the usual notice given to the public of the running of trains on the various roads which constitute a through line. Its manifest purpose is to inform the traveling public of the time of the departure and arrival of trains and over what roads the same run. The defendants maintained that that advertisement had no tendency whatever to establish a joint liability on the part of all the roads, to show that they were partners, or in any way jointly liable, for if it had any tendency to establish a partnership between the Alexandria and Washington and the Pennsylvania Railroad companies, then it had the same effect to establish a partnership and joint liability between the Alexandria and Washington and all the roads between Washington, Baltimore, Philadelphia, and Chicago, and between Alexandria and

Cincinnati, St. Louis, Rochester, Buffalo, Brooklyn, Boston, Pope's Creek, and Annapolis.

The true intent and purpose of the advertisement is manifest on its face: it is to advertise great lines of railroads, and the general inference and deduction must be in harmony with that manifest and controlling purpose.

It did not justify any such inference of copartnership or joint liability because it was signed by Wood or by Pugh, for James R. Wood was the general passenger agent not only for the defendant roads but also for the Philadelphia, Wilmington and Baltimore, the New Jersey and Camden, the Atlantic and West Jersey, and the Northern Central. (See testimony to that point of Robert A. Parke, p. 36.)

The witness Stevens having testified as to how the employees of the Baltimore and Potomac, the Alexandria and Washington, and the trustees of the Alexandria and Fredericksburg were paid, and having answered that they were paid from a pay-car, he was asked whether any name was painted on the car or engine that hauled the pay-car, and whether there was any sign or name of a company on the pay-car, or anything of that sort to indicate to what road it belonged, and whether he noticed who were the employees of the company in charge of the car—brakeman, conductor, and engineer—he answered that the engineer had no uniform; that the conductor and brakeman had a uniform on "like all the men in the employ of the Pennsylvania Railroad—a blue suit with silver buttons;" to which the defendants objected, and the said objection constitutes the 13th exception (page 81).

If that testimony had a tendency to establish a joint liability for this injury, then it is respectfully submitted that the test of liability is not what the existing agreement between the companies was, nor how the respective roads held themselves out to the public, but what color of uniform and

what kind of buttons conductors and brakemen wore. It did not tend in any degree whatever to establish either of those issues. It was not a circumstance that could be considered or have weight, but under the sanction which the court gave to it, it had a most damaging effect, and in this way the Pennsylvania Railroad Company was included in the verdict for damages, although it never had an employee in Washington at all except as it had employees, ticket agents, and others to look after its interests with competitive lines. The admission of such evidence for the purposes for which this was admitted seems to be most extraordinary.

The witness Parke, at page 32, was asked by the plaintiffs how far the Pennsylvania Railroad's southern system extended; he answered: "The Pennsylvania Railroad really does not extend south at all. The Pennsylvania Railroad proper, of which I am the representative, extends from Philadelphia to Pittsburg."

At page 83 it will be noticed that the counsel for the plaintiffs called for the pay-rolls for the months of January and February, upon which Bennett, Frere, Maloney, Augur, Stevens, and Sharpe were paid. They were accordingly produced, and are found from pages 84 to 95, inclusive.

Three of them are the pay-rolls of DuBarry & Green, trustees, operating the Alexandria and Fredericksburg Railroad, January, 1885.

Another is for February, the very month in which the accident occurred.

Then follow five pay-rolls of the Baltimore and Potomac, January and February, 1885, also covering the time of the collision, some being the rolls of employees engaged in operating motive power, and others in conducting transportation, upon which are found the names of Stevens, Maloney, Sharpe, and Augur. But these names were on the Baltimore and Potomac pay-rolls for convenience only. (See Wilkins, p. 137.)

Following the pay-rolls, beginning on page 96, are found the checks called for by the plaintiffs, and with which these employees were paid, including Augur, Miles, and Frere.

The checks used to pay the persons who ran the Fredericksburg fast freight are the checks of J. N. DuBarry and John Green, trustees, operating the Fredericksburg road. (See p. 96.) They are signed by Leib and endorsed by Carter, the local treasurer and superintendent, respectively.

At page 97 are checks drawn to pay employees of the Baltimore and Potomac, signed by N. H. Hendle, cashier, for the treasurer.

It will be observed that there is no pay-roll of the Alexandria and Washington, or the receiver of that road. The reason that there was not is explained by the witness Wilkins at page 174:

> "I understood you to say * * * that this railroad (Alexandria and Washington) was not conducted through the organization of the Alexandria and Fredericksburg?
>
> "I said with one exception, that is the auditing department. The treasury of Alexandria and Washington Railroad, since my knowledge of it, which extends back to 1875, has always been operated, as far as the accounting was concerned, through the organization of the trustees of the Alexandria and Fredericksburg Railway. I continued that arrangement when I was appointed receiver."

If any testimony is required that the three roads—the Alexandria and Fredericksburg, operated by the trustees, the Alexandria and Washington, operated by the receiver, and the Baltimore and Potomac, operated by that company itself—were not jointly liable nor held out as partners, it is found, and of the most satisfactory character, in these pay-rolls, solemn instruments with various signatures to verify

them, involving large sums of money, every one of them, and in each instance is the distinct separate roll of each separate company, no interchange nor sharing of losses or profits, but absolutely individual and separate.

The method of the payment through the pay-car, as shown, was this: A pay-car was brought into the yard at Washington, where the employees could assemble, sign their vouchers, and receive their checks. It is certainly a startling proposition that a jury could be allowed not only to consider such a payment, but the uniform worn by the conductor and brakeman on that car, as circumstances to establish a joint liability or a copartnership, and that witnesses could be allowed to prove the uniform and create the liability of the Pennsylvania Railroad Company by saying, "The conductor and brakemen had a uniform on like all the men in the employ of the Pennsylvania Railroad—a blue suit with silver buttons." Mr. Wilkins says, at page 178, that the difference between the uniform of the Alexandria and Fredericksburg and the Baltimore and Potomac was in the buttons.

This matter seems too trivial for argument, but the whole testimony as to the joint liability of the Pennsylvania Railroad Company is of precisely the same trivial character, and we shall find, when we come to consider the exception to the charge, that it actually did produce an effect upon the mind of the chief justice trying the cause.

The 14th exception is like the two just considered (page 83).

The matter referred to there is the bill rendered by Gibson Brothers, found at page 82, against DuBarry and Green, trustees, operating the Fredericksburg road in 1884, for printing six hundred copies of a time table, being the same paper found at the end of page 40, and the same table that controlled the movements of the Virginia Mid-

land and the Alexandria and Fredericksburg road, operated by the trustees over the track of the Alexandria and Washington. It was signed by Pugh, manager, Kenney, general superintendent, and Carter, superintendent.

That bill was paid by the trustees of the Alexandria and Fredericksburg Railway Company, DuBarry and Green. (See the receipt, page 83.)

In the defendants' prayer, 45th exception (page 194), there is, I submit, a correct statement of the whole law as to joint liability, to wit, that the burthen of proving the joint liability is on the plaintiffs, and if the roads, for the purposes of convenience and economy, transported goods over their several lines, each receiving its proportionate share of the earnings without any sharing of general losses and profits of the companies, then the company on whose road the injury was done was alone responsible. This doctrine was denied, and the court, on its own motion, gave the instruction contained in the 56th exception (page 208), to the effect that if trains were run over the roads "in the interest of all, each contributing to the expense and showing a division of the profits, as they might be determined by a common agent," they were jointly liable.

This statement, we say, was faulty, because there was no proof to show a division of the *general business* of the companies, nor was there any evidence that there was any division of expenses; on the contrary, the evidence shows that each company paid its own expenses and had nothing to do with the expenses of any other company.

A division on a *pro rata* basis was not an indication of joint liability, as was said in *Insurance Co.* v. *Railroad Co.*, 104 U. S., at page 158:

> "There the defendant received compensation only for transportation over its road and settled separately

with the Dispatch Company." * * * "The mere fact that it joined with other companies in establishing a through rate from St Louis to New York, to be divided between themselves upon the basis, *not of expenses incurred or investments made*, but of distance simply, does not imply a joint undertaking."

The plaintiffs produced an illustrated railroad map showing, among other things, in striking colors, a line of railroad between Philadelphia and Quantico, having the initials of the various roads over which the through line passed printed thereon. The witness Wilkins was asked by the plaintiffs whether that was a true map, and what the initials signified. The plaintiffs also produced the annual reports of the Pennsylvania Railroad Company, 1884–5, 1885–6, and the same question was put to Wilkins in respect to these reports.

The plaintiffs also put in evidence certain statutes of Virginia requiring sworn railroad reports to be made to the State authorities. They also called several witnesses to show that the Alexandria and Washington and the Alexandria and Fredericksburg roads had made reports, but the same were not produced, but in lieu thereof a consolidated report which had been published by the State and which contained in general the same facts that were embraced in the reports so made by the railroad companies was read, together with extracts from said annual reports of the said Pennsylvania Railroad Company, and from the consolidated State reports. (See also the 50th exception, which relates to the same matter.) They also produced and put in evidence a ticket, on the back of which was the official stamp of the Pennsylvania Railroad Company, issued in the city of Baltimore; a coupon attached to it contained the following: "Issued by the Pennsylvania Railroad Company, on account of the Alexandria and Fred-

ericksburg Railway, one first-class ticket from Washington to Quantico." The witness Wilkins was asked whether that ticket would carry a passenger to Quantico, and he answered, it would (page 144) when it was issued. The ticket was sold by the Northern Central Railroad Company in Baltimore, as appears by the endorsement. This kind of evidence was surely incompetent to go to the jury as evidence of the joint liability of the Pennsylvania Railroad Company with the three local companies.

The matters above mentioned are the subjects of exceptions 17 (p. 140), 18 (p. 143), 19 (p. 144), 20 (p. 145), 23 (p. 152), 24 (p. 169), and 62 (p. 211).

To the admission of the testimony relating to these several matters, and to the reading of the extracts, the defendants objected. The answer of Wilkins, as to the reports and the extracts referred to in these exceptions, are found on pages 150, 151, 152, and 153.

The witness said: "I do not think the report is a whole report. It is a report as far as it goes."

The quotations which were read were as follows:

> "To the stockholders of the Pennsylvania Railroad Company: The Board herewith submits its report for the year 1885, with such data relating to the *lines embraced in your system* as will give you a clear understanding of their physical and financial condition.
>
> "The Baltimore and Potomac Railroad Company connects your lines with Washington and the South.
>
> "List of bonds owned by the Pennsylvania Railroad Company December 31, 1855: Alexandria and Fredericksburg Railway, 1st mortgage, 7 per cent., gold; number of bonds, 1,000; rate of par, $1,000; total, $1,000,000.
>
> "Baltimore and Potomac Railroad, 2d mortgage, income, 6 per cent.; number of bonds, 2,000; rate of par, $1,000; par value, $3,000,000 ($2,000,000).

"List of stock owned by Pennsylvania Railroad Company December 31, 1885: 60,852 shares of the Baltimore and Potomac Railroad Company, $50 a share; value, $3,042,600.

"Number of shares, 217,819 of the Philadelphia, Wilmington and Baltimore Railroad, $50 per share par value; total par value, $10,890,950.

"Thirty-ninth annual report of the Board of Directors of the Pennsylvania Railroad Company to the stockholders, presented at the meeting held March 9, 1886."

"Directors of the Pennsylvania Railroad Company for the years 1886 and 1887:

"George B. Roberts, Wistar Morris, Alexander M. Fox, Alexander Biddle, N. Parker Shortridge, D. B. Cummings, Henry D. Welch, John Price Wetherel, Wm. L. Elkins, Millian Thaw, H. H. Houston, A. J. Cassatt, C. A. Griscom, Edward Smith, Frank Thompson, J. N. DuBarry and John P. Green."

OFFICERS OF THE COMPANY:

"President, George B. Roberts; 1st Vice-President, Edmund Smith; 2d Vice-President, Frank Thompson; 3rd Vice-President, J. N. DuBarry; 4th Vice-President, John P. Green; Treasurer, John B. Taylor; General Solicitor, John Scott, Secretary, John C. Simms, Jr."

The plaintiffs thereupon identified by the witness Sumpter the book published by the State said to contain the substance of the reports made by the Alexandria and Washington Railroad Company and the Alexandria and Fredericksburg Railway Company, and read in evidence from said book so much thereof as contains, or purports to contain, the report of the Alexandria and Washington and the Alexandria and Fredericksburg Railway Company, being "The 9th Annual Report of the Railroad Commissioners of the State of Virginia," which book contains "what pur-

ports to be said reports of said companies." Then follows a certificate by Kerr, Leib, and Carter, respectively, that the reports of the two roads were prepared in obedience to a resolution as to the form of annual reports "of railroads and other companies, adopted March 15, 1856, by the general assembly of Virginia." It will be remembered that every company doing business in the State of Virginia is required to make such annual report under penalty of forfeiting its charter. (For these extracts see Rec., pp. 150, 151, 152, 153, 154, and 155.)

Then follows the report of the Alexandria and Washington, tables from A to J, and then a list of the officers of the old company, Alexandria and Washington Railroad, which is followed by a similar report and tables of the Alexandria and Fredericksburg and a list of the directors and officers of that company, which reports of the two roads are found in the record, pages 155 to 168.

All of said testimony taken together established, if properly proved, among other matters, three principal things:

First. That the board of directors of the Pennsylvania Road spoke of the Baltimore and Potomac, the Alexandria and Washington, and the Alexandria and Fredericksburg as "lines embraced in your system," or "lines controlled by your company," and "the Baltimore and Potomac Railroad Company connects your lines with Washington and the south."

Second. That the Pennsylvania Railroad Company was a stockholder and a creditor (bondholder) in the Baltimore and Potomac and the Alexandria and Fredericksburg Companies.

Third. That some of the officers and directors of the Pennsylvania Railroad Company were also part of the officers and directors, but not all of them, of the Alexandria and Fredericksburg and the Alexandria and Washington.

These three facts were produced, argued, relied upon and given to the jury as proof or testimony from which the inference might be lawfully drawn that all the roads were jointly liable.

"Tend to prove" is a very inadequate expression. The rule cannot be that every fact, no matter how immaterial or remote, can be put in evidence before a jury to sustain an issue on the ground that it "tends to prove" something.

The true rule is that—

> "All evidence must have relevancy to the question in issue and tend to prove it. If not a link in the chain of proof it is not properly receivable."
> *Thompson* v. *Bowie*, 4 Wall. 463, 471.

> "The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."
> *U. S.* v. *Ross*, 92 U. S. 281, 284.

To the same point,

See also *Xenia B'k* v. *Stewart*, 114 U. S. 224, p. 231, and the following:

> "The evidence offered was too weak and vague to contribute to an intelligent decision by the jury to the question in issue."

If these facts and circumstances do render the roads justly liable, then they render the individual stockholders of each of the roads personally liable in case the corporation itself is insolvent, and recourse must be had against stockholders.

That is to say, if the acceptance by Mr. Roberts, and other members of the board of directors of the Pennsylvania Railroad Company, of offices in the Alexandria and

Washington and the Alexandria and Fredericksburg Company rendered the Pennsylvania Railroad Company liable for the injury done on the Alexandria and Washington road, then a foreign stockholder of the Pennsylvania Company is also individually liable. Why? Not because it was a debt or obligation lawfully incurred, nor a thing done by resolution or other act of the Pennsylvania directors or company, but the sole, individual, voluntary act of Mr. Roberts, in consenting to be the president of the Alexandria and Fredericksburg road.

What different or other rule would prevail in a case where the Pennsylvania Railroad becomes a stockholder in the Alexandria and Fredericksburg and the Baltimore and Potomac Railroads? As such stockholder it might be liable in common to an assessment made against the stockholders in case the subscription to the stock had not been fully paid or the charter contained an individual liability clause, neither of which existed in this case. The only loss which the Pennsylvania Railroad could suffer in case of the insolvency of the Alexandria and Fredericksburg road would be the loss of the money which it paid for its bonds. How, then, can it constitute a circumstance from which it can be lawfully inferred that these companies were jointly liable or were partners?

The same is true in respect to the bonds of the two roads, Baltimore and Potomac and Alexandria and Fredericksburg, held by the Pennsylvania Company. What are the inferences that can lawfully be drawn from the fact of it thus becoming a creditor? Simply this: that it was thought that the bonds were a good security, and therefore a desirable investment, or, what we all know was the real and common fact, that an important road, seeking to establish feeders and to draw business to itself, encourages, as it lawfully may, lateral or connecting roads by subscribing for

their bonds or their capital stock. That was the only legitimate inference that could be drawn from that transaction.

The Pennsylvania road in these particulars differs in no sense from the United States or a State when they become a subscriber to stock or bonds. They are not acting nor liable as States, but their rights and liabilities are exclusively those of any other stockholder or bondholder.

The publication of the time-table and the advertisement in the *Star* are of the same character—common, ordinary, every-day transactions between through lines composed of independent roads, and the expression in the annual report, "lines embraced in your system," did not import that they were jointly liable nor partners, but only that these roads were connecting links in a longer line made up of many roads.

The true nature of the matter is fully explained by the quotation from the report (page 151):

> "The Baltimore and Potomac Railroad Company connects your lines with Washington and the South."

"Your lines" did not include the Baltimore and Potomac, Alexandria and Washington, or Alexandria and Fredericksburg in the sense of absorbing those roads.

That is shown very plainly, too, from the map. Each road has its name marked on it, and its separate identity is thus preserved.

Exceptions 21 (p. 146) and 22 (p. 150) refer to this transaction.

The first exception, p. 39; the second exception, on the same page; the fifth exception, p. 74; the sixth, page 74; the 7th exception, p. 75; the 25th exception, p. 185, and the 26th exception, p. 185, present the same questions.

Among the freight destroyed by the collision, it is claimed,

was freight received by the Pennsylvania Railroad Company and transported over its own line to the end thereof, where it was delivered to be forwarded to the Philadelphia, Wilmington and Baltimore, and by it to the Baltimore and Potomac, and by it to the receiver, as to which freight the Pennsylvania road was a mere forwarder; and having paid for it, or become liable to pay for it, that road presented a claim against the receiver for the same, so as to reimburse itself for the loss. The plaintiffs' counsel (183) undertook to show that some, at least, of this freight was shipped from Baltimore, but failed. But it is submitted that it is immaterial where the freight was shipped from. It is suggested that it is more than probable that the "Pennsylvania system" of railroads, for the sake of economy, employs one man to attend to the claims made against any of the companies in the system for loss of freight, and that when freight is lost or miscarried this one agent is charged with the duty of adjusting the matter and charging the loss to the company which created it. As a matter of business and as a matter of economy there can be no legal objection to this arrangement; it surely cannot carry with it a liability for all "shortcomings" of the various lines of railroad "included in your system," as one report expresses it, or of railroads "*controlled by your company*," as another report expresses it.

The court below, in general term, gives great prominence to the fact that this claim for loss of freight was made by the Pennsylvania Railroad Company, but is somewhat inaccurate, in its opinion, as to the facts. The court says (p. 226):

> "Another quite significant fact was that the Pennsylvania Railroad Company made a claim on the Washington and Alexandria Railroad *for its proportion of damages for the destruction of merchandise in this*

very collision. (Italics in opinion.) There was an attempted explanation of this, but it was not clearly testified to. There was an intimation that the Pennsylvania Company had assumed some responsibility for the freight on its own lines, and then was seeking to reclaim what it had to pay to the other roads. If that had been so, it would be entitled to claim the whole damages from the other road if they were entirely independent in their business dealings, but that was not the case. It sent a bill to the Washington and Alexandria Railroad Company *for its proportion* of the damages occasioned by this collision. (Italics are in opinion.) That implies, of course, that somebody else has to bear a proportion of the loss, and that this company, if it paid damages, would have its proportion to pay. That is a somewhat significant fact in the direction of showing joint responsibility, as it appears to us."

A reference to the claims presented will show two facts, to wit, first, that the claims were made against the receiver of the Alexandria and Washington Company and not against the company, and, second, that the claim was not for a *proportion* of the loss, but for the *whole* of it. The details of the claim were evidently made out on a printed blank used for that purpose generally, which uses the word "proportion;" but it will be observed that the column showing the amount of the loss and the column showing the "proportion due" contain exactly the same figures or amounts. The point made by the court in general term, therefore, avails nothing.

The printed rules on the time table, and referred to there, controlled the running of trains, and fixed the rights and responsibilities of agents of the several companies, and could not be abrogated, suspended, or modified by parol testimony.

It having been proved that the paper known as time-table No. 3, following page 40, and the printed matter, "Extracts

from Book of Rules," from pages 40 to 49, were the binding rules and regulations, governing all roads using the track of the Alexandria and Washington road (see recital of proofs in that respect, page 39, foot page 40), the plaintiff asked the witness Jones, as to the employees of what road had charge of the Midland train running north and south over the Alexandria and Washington, and he answered, "The Baltimore and Potomac," which is the matter of the first exception.

The witness Charles T. Stewart was asked, "Who was in charge of the train, Virginia Midland, at the time of the collision," and he answered, "The pilot Bennett and the conductor Wilkins," which is the matter of the 2d exception.

The plaintiff asked Bruce whether Bennett had made any complaint about loss of time on the road between Alexandria and Washington, and he answered, the pilot asked several times why time was lost, which constitutes the 5th exception (p. 74).

The witness Bruce was asked by the plaintiff what was the method of getting through the gauntlet before the erection of the signals, and he answered, "Passenger trains had the superior right," and that freight waited for the passenger, which constitutes the 6th exception (p. 74).

The same witness was asked whether he did not frequently, when running north-bound passenger trains, pass south-bound trains waiting for him on the north side of the gauntlet, and he answered "Yes," which constitutes the 7th exception (p. 75).

The witness Bennett was asked whether he considered a south-bound train on the north side of the arch an obstruction to a north-bound train on the south side of the arch, which is the matter of the 25th exception.

The same witness was asked (p. 185): "What were your rights that night (time of the collision) in respect to the

right of way of your train, the white light being exhibited to your engineer in approaching the signal?" which is the matter of the 26th exception.

The testimony recited shows all the facts necessary to understand the exceptions.

The engineer, conductor, and brakemen of the Virginia Midland train were the employees of that road and paid by it, and, of course, they would ordinarily have charge of the train, as they controlled the motive power, but there was, and always has been, put on all the Virginia Midland trains a pilot. (See testimony of Wilkins, pp. 176 and 177.)

The duty of the pilot was to see to the security of the train. He might relieve the engineer and conduct the engine, or relieve the conductor and act as conductor, and when he held these offices his duties were those that belonged to these offices (p. 177), and rule 121 provided that a conductor and an engineman should be equally responsible for the safety of trains. It was, therefore, not a matter of the opinion of the witness as to who had charge of these trains, but it was to be settled by the "rules and regulations" themselves.

The same is true as to who had the right of way, and whether a south-bound freight train north of the arch was an obstruction to a north-bound train south of the arch.

The place was what was known as the gauntlet, and by a note on the time-table number 3 attention was especially called to rule 90, which was made applicable to the gauntlet, and rule 90 required all trains to approach that point *prepared to stop*, and not proceed until the signals were seen to be right or the track was plainly seen to be clear. Other rules provide for what was to be done on double tracks and what was to be done on single tracks, and what was to be done in case a red light or a white light was shown. For instance, rule 78 provided that all trains going

in a specified direction on a single track should have the right of way. Rule 79 provided what should be done when two trains met on a single track, and it was maintained that under these written rules none of the regulations applicable to a single track applied to the gauntlet, because it had four rails, and not two—it was a double track, and not a single track—and because there was a specified rule (90) made specially applicable to the *gauntlet*, and the witness was asked to tell his opinion as to its meaning.

They were asked also what had been done in that respect, whether trains had waited, and whether time had been lost because they had to wait, and what was the practice in that respect before the signals were erected.

All these questions were allowed under objections; subsequently the defendants asked a similar question.

On cross-examination of the witness Wilkins, he was asked which trains, freight or passenger, south or northbound, had the right of way at the gauntlet, and the question was objected to and excluded, which constitutes the 16th exception (p. 139).

One or the other of these questions was wrong; both could not be right.

Jones v. *Johns*, 18 How., p. 153.
Olerick v. *Lenman*, 23 How., p. 61–62.
Blevins v. *Mead*, 23 How., p. 431.
Ins. Co. v. *Wright*, 1 Wall., p. 470.
Partridge v. *Ins. Co.*, 15 Wall., p. 579.
Lyman v. *Ins. Co.*, 15 Wall., p. 676.
Taylor v. *Brown*, 20 How., 447.
The Delaware, 14 Wall., 602.
1 Greenleaf, 292, 293.

It is claimed in behalf of the defendants in error that all this was rendered immaterial by the trial justice, who

withdrew all the parol evidence on this subject (202, 203) from the consideration of the jury. This may be true, but the trial judge then instructed the jury that the north-bound passenger train which was seen by Bruce "*had the right of track over the south-bound freight train.*" This was an erroneous interpretation of the rules, and forms the basis of the 58th exception (p. 209). More will be said about this interpretation further on.

After the testimony of the plaintiffs in chief was closed, which testimony is set out in the record from pages 31 to 103, and is embraced in the exceptions from 1 to 14, inclusive, the defendant the Alexandria and Washington Railroad Company moved the court, on said testimony, to return a verdict in favor of that defendant; which motion being refused, a like motion was made by the defendant the Alexandria and Fredericksburg Railway Company; which last motion being overruled, a like motion was made as to the defendant the Pennsylvania Railroad Company, and was overruled, and constituted the 15th exception (page 103).

After the testimony on both sides had been closed (which testimony is set forth in the foregoing bills of exception, from 1 to 26), the defendant the Pennsylvania Railroad Company, on said testimony, moved the court to instruct the jury that upon the pleadings and evidence the defendant, the Pennsylvania Railroad Company, is entitled to a verdict in its favor, which request was refused and constituted the 27th bill of exceptions (p. 186).

The same motion was thereupon made on behalf of the defendant the Baltimore and Potomac, which was refused and is the 28th exception (p. 186.)

A similar motion was thereupon made and denied on behalf of the Alexandria and Fredericksburg Railway Company, which is the 29th exception (p. 186.)

A similar motion was made and refused as to the Alex-

andria and Washington, and constitutes the 30th bill of exceptions (p. 187).

The 15th, 27th, 28th, 29th, and 30th exceptions should be considered together, and the single point presented is that the testimony being all in, and it appearing that there was no testimony upon which a verdict for the plaintiff could be sustained, the court should have directed the jury to find a verdict for the defendants.

Exceptions 31 (p. 187), 51 (p. 205), 52 (p. 206), present the same question: Whether the Alexandria and Washington Railroad Company—the corporation itself—could be liable for an injury resulting from the negligence of two other companies running trains over its track, while the road and all its property was in the control and exclusive possession of the receiver appointed by a competent court with full jurisdiction over the subject-matter.

The decree appointing the receiver was made in the circuit court of the United States for the eastern district of Virginia, on the 19th of January, 1882.

The decree is found on page 131 *et seq.*, whereby, in the first subdivision, all its property of every kind, as well as its franchises, were placed in the possession of George C. Wilkins, receiver.

By the 3d subdivision he was required to take possession of all the property and to "continue to run and operate the said railroad of the said defendant as the same is now operated," to keep the same in good condition and repair, to pay and discharge all expenses, "to make from time to time in his best discretion all needful and proper traffic arrangements with other roads."

The 4th subdivision required him to make and file an inventory of all the property.

By the 5th subdivision he was required to exercise his best discretion in the management of the property, but it

was provided that he should not be individually liable for anything done by him or his agents in good faith in the management thereof; but the premises should be chargeable with any judgment which might be established against the receiver.

By the 7th subdivision the railroad company, the defendant in the suit, was required to deliver up and surrender to the receiver all and singular the premises, "and in the meantime and until the actual taking possession of the said property by the receiver it is ordered that the Alexandria and Washington Railroad Company, its president, officers, agents, and attorneys," be enjoined and restrained from disposing of, or parting with, any of said property, real or personal.

A final decree for the sale of the property was entered on April 5, 1884; a part of what was proved on that subject is certified by the presiding justice on pp. 136–7, in substance as follows: That from January 19, 1882, the date of the appointment of the receiver, until after the collision, he continued, as receiver, a traffic arrangement with the Virginia Midland, the Baltimore and Potomac, and with DuBarry and Green, trustees of the Alexandria and Fredericksburg, which he found in existence when appointed; that the Virginia Midland paid him for the use of the track in running their cars over it, and that the Baltimore and Potomac, and DuBarry and Green, trustees of the Alexandria and Fredericksburg road, did their business over it on a trackage basis; that the receipts for the business done over it by the Alexandria and Washington, Baltimore and Potomac, and Alexandria and Fredericksburg were divided among them on the *pro rata* basis, "each receiving the same proportion thereof as the miles of track of each road sustained to the whole number of miles;" that after the receiver took possession, the gross receipts went into the

hands of Leib, treasurer, and were distributed *pro rata* by the common auditor, "and the receiver received the *pro rata* share of the Alexandria and Washington road;" that when the receiver took possession of the road he appointed Pugh, Carter, and other agents, who managed the business of the road, and he settled his accounts in his name as receiver, and such agents and officers were so selected and appointed by him because it was more economical to use those agents, who were also agents of the other roads.

The receiver also testified on the same subject as follows: On p. 172: "I operated the road during my receivership," "through my own organization," "as a single intesest." "By my organization as a receiver." "Through no other road, except that the accounting was done through the organization of the trustees of the Alexandria and Fredericksburg." "It was operated by me as receiver." "Other railroads had a right to run over my track." Page 173: "They did not operate it;" "they ran over my track," "under the authority of my office as receiver." "As receiver I continued the existing arrangements." "There had been an arrangement whereby they (the trustees of the Alexandria and Fredericksburg) ran their trains from the city of Washington to Quantico, Virginia." "The arrangement was that the net earnings of their trains should be *pro rated* between the respective companies."

This witness had given the same testimony in the case before the United States court, and on cross-examination, under the questions of the plaintiffs, it was repeated again in part, at pages 173, 174.

In relation to the compensation for carrying the mail, he says, at page 178, that the same arrangement continued "during my receivership."

On the same page this question was asked:

"Then the mail, I understand, was brought from Alexandria to Washington under a contract between your system of roads, whatever it was; am I correct?

"Answer. Not with my system. I believe it was brought here under direct contract with the Alexandria and Washington road, between Washington and Alexandria; that is to the best of my knowledge."

At page 180 he testified, in speaking of the money received for carrying the mail between Washington and Alexandria:

"Question. Who got that money eventually?

"Answer. I did.

"Question. All of it?

"Answer. All of it—wait a moment. No, sir; I am mistaken about that; I am sure I did not get all of it, because a portion of it passed over the Baltimore and Potomac and a portion over the Alexandria and Fredericksburg.

"Question. The Baltimore and Potomac was paid according to its mileage?

"Answer. Yes, sir; and the Alexandria and Fredericksburg according to its.

"Question. And the Alexandria and Washington according to its?

"Answer. Yes, sir.

He also says, at page 181, that he issued a printed circular to give information to the public that he was running the road as receiver of the court, and that he had taken possession of the property, and to continue the officers and employees. They were generally distributed among railroad men, and all parties who were supposed to be interested, and his impression is that he published notices in the depots at the ends of the line.

This, we insist, constituted, within the rule of all the reported cases, an instance of sole and exclusive management

of a railroad by a receiver, *and was practically an act of the court appointing him*, a transaction altogether independent and beyond the control of the company; we are considering now only the question of responsibility between the receiver and the company.

The proceeding in which the receiver was appointed was an adversary proceeding brought by a judgment creditor, Alexander Hay, to enforce the lien of his judgments, and that of all the other lien-holders who were present and litigating as to their priorities.

The receiver found an existing contract in operation for carrying the mail and one for the right to pass over the road on the trackage basis, and another allowing two other roads, one at each end of the Alexandria and Washington, to do their respective business over its track on a *pro rata* basis, but neither of the roads, Baltimore and Potomac, Alexandria and Fredericksburg, nor Virginia Midland had any control whatever over the Alexandria and Washington road, and the decree itself directed the receiver to continue the business under existing contracts.

The settled doctrine as to responsibility under such circumstances is—

> "The company is not liable for torts committed or injuries inflicted while the road is in the hands of and being operated by a receiver."
> 2d Woods' Railways, 1392, § 345.
> 2d Woods' Railways, 1629, § 468.

Indeed, the court below had no jurisdiction over this suit as against the Alexandria and Washington Railroad Company, and in that respect it is in the same condition as was *Barton* v. *Barbour*, 104 U. S. 126.

When this suit was commenced the receiver was in actual possession under the decree of the circuit court of the

United States. He could not have been sued without the leave of that court. Why? Because judgment and execution would have divested him of the property and have changed the order in which the assets of the company would be applied for the satisfaction of debts, and a suit against the company, if it could be maintained, would have accomplished the same purpose.

See, to the same point——

Peale v. *Phipps*, 14 How. 368.

Cowdrey v. *Galveston R.R. Co.*, 93 U. S. 352.

In *Express Co.* v. *R.R. Co.*, 99 U. S. 121, which was a suit brought against the receiver and the road on a contract entered into by the company before the appointment of the receiver, the court said, at page 199:

> "No party defendant was necessary, but the receiver. * * * The presence of the other parties was immaterial and the bill might well be dismissed as to them."

The plaintiffs were deprived of no right by restricting them in their action to a suit against the receiver. On the other hand their position was improved, because it was provided, as we have seen by the decree appointing the receiver, that any judgment rendered against him for liability incurred by him in running the road should nevertheless be chargeable against the property; which was precisely what the law itself would have done, as was said in *Cowdrey* v. *Galveston Railroad Co.*, 93 U. S., at page 356:

> "The allowances for goods lost in transportation and for damages done to property whilst the road was in the hands of the receiver were properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road."

The same doctrine is declared in *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, where it is held under the 10th paragraph that claims for damages like running expenses had priority.

The defendants' prayer, contained in the 31st exception, was unobjectionable, and stated the law as it is. The court was asked to instruct the jury if they were satisfied from the evidence that at the time of the accident the property of the Alexandria and Washington Railroad Company was in the exclusive possession of the receiver thereof, appointed by a circuit court of the United States, the verdict must be in favor of the Alexandria and Washington Company.

The court not only refused that prayer, but it erroneously instructed the jury (51st exception) that if the company "was paid by the United States by drafts, payable to the order of the agent of the said company appointed by its board of directors to receive the same," and that the colliding trains were running over the road "in pursuance of an agreement made by the parties in control of said road prior to the appointment of the receiver, and if the receiver when appointed "continued in office as superintendent, general manager, and treasurer the same persons as had theretofore discharged the duties of these positions, and if the business of this railroad, *so far as was known to the public*, was continued in the same way, so far as the general public could know, as before, and was so conducted at the time of this accident, and the *only substantial duty* the receiver discharged was to receive the net earnings of the road from the treasurer, and to account therefor to the court by which he was appointed," then, if you should find the Alexandria and Washington Railroad Company guilty of negligence, "your verdict will be against it and for the plaintiff."

It can hardly be said that the validity of a decree of a United States circuit court appointing a receiver depends, in any degree, upon the extent of the knowledge of the *public* concerning its nature, extent, or existence; the public are supposed to take pains to find out what the courts have done in relation to property in its possession. Aside from this the plaintiffs were not a part of the "public" so far as their causes are concerned. They were agents of the Post Office Department and constantly employed on this line. The pains which the trial justice took to impress the jury (205) with the idea that the knowledge of the public touching this decree and the conduct of the receiver appointed by it was error and must have misled the jury.

Again, the trial justice submitted it to the jury to determine whether or not the "only substantial duty that the receiver discharged was to receive the net earnings of the road from the treasurer and to account therefor to the court by which he was appointed" (205), and instructed them that if they found this to be all he did, and also that the Alexandria and Washington Railroad Company was guilty of negligence, then their verdict must be against that company. It is submitted that this was a plain error and very injurious to the Alexandria and Washington Company.

In this connection it may be said that the undisputed evidence shows that in June, 1884, the receiver obtained leave of the court to put in this very automatic electric-light signal (139), and it is also undisputed that when he took possession of the property of the company he appointed a staff of officers, or continued them in office, which is the same thing, to manage the practical operations of the railroad.

The following evidence on this subject is also interesting (p. 172), Mr. Wilkins being examined by counsel for the plaintiffs, to wit:

"Q. Do I understand you to say that during your receivership the Alexandria and Fredericksburg operated the Alexandria and Washington?

"A. No, sir; they did not.

"Q. Who did operate the Alexandria and Washington during your receivership?

"A. I operated it.

"Q. Through what organization?

"A. Through my own organization.

"Q. It was operated as one interest, was it not?

"A. No, sir; it was operated, during my receivership, as an entirely independent piece of property.

"Q. Was it operated or not as one interest?

"A. What do you mean by one interest?

"Q. Was it operated as a joint interest or as a single interest?

"A. As a single interest.

"Q. And operated by what organization?

"A. By my organization as receiver.

"Q. Through the instrumentality of what other road, if any?

"A. Through no other road, sir, with but one exception; that the accounting was done through the organization of the trustees of the Alexandria and Fredericksburg.

"Q. I understand you to say that you had no rolling-stock at all as receiver of the Alexandria and Washington?

"A. I had none, sir.

"Q. How could you operate a railroad without rolling-stock?

"A. The general term of operating a railroad—I conducted its operation, and I could have employed rolling-stock if I had desired.

"Q. Did you do it?

"A. I did not.

"Q. But the road was operated, was it not?

"A. Yes, sir.

"Q. Will you please answer my question, and state through whom it was operated?

"A. It is operated through no one.
"Q. By whom was it operated?
"A. By me as receiver.
"Q. Whose rolling-stock did you use?
"A. I did not use any one's rolling-stock.
"Q. Then the road was not operated, was it?
"A. It was.
"Q. Will you please explain to the jury how it was operated without rolling-stock, and that you used no rolling-stock?
"A. Certainly, with pleasure; because other railroads had a right to run their trains over my track?
"Q. To run over your track; who ran over your track?
"A. Other railroad companies.
"Q. Then the other railroads operated your track?
"A. No, sir; they did not operate them. They ran over them. The trains of other railroad companies ran over them.
"Q. Under whose authority?
"A. Under the authority of my office as receiver.
"Q. And under whose control?
"A. Under the control of Mr. H. H. Carter, superintendent; Mr. Kenney, general superintendent, and Mr. Charles E. Pugh, general manager.
"Q. And all the trains that ran there ran under the control of these men?
"A. They did, sir."

The treatment which the decree and the other proceedings of the circuit court of the United States for the eastern district of Virginia received at the hands of the trial judge in this trial was not very respectful. It seems to me that the plain inference is that the trial justice regarded this decree appointing a receiver, and the acts done under it, as not entirely in good faith, and that therefore they were a proper subject of investigation by a petit jury in the court below.

This instruction was so manifestly against the law that it

was not and could not be corrected by what was said in the instruction given which is referred to in the 52d exception, although it was therein said that if the jury find from the evidence that the business was conducted by the receiver, at the time of the collision, in his own name and in such manner *that it could be generally known by the public* that he, and not the company, conducted the business, and that he did so "to the entire exclusion of any control or participation by the company," or its officers, then their verdict should be for the company, because, having already given to the jury as the law of the case, in the instruction under the 50th exception, that if he continued in office as superintendent, general manager, and treasurer the same persons as had before discharged the duties of these positions, then the verdict should be for the plaintiffs, the jury would thereunder necessarily conclude that the employment of these in the manner it was done rendered the corporation liable.

Exceptions 36, 37, 53, 54, 55.

The defendant the Alexandria and Fredericksburg Company requested the court to instruct the jury that if they should find that the property of that company was in the exclusive possession and control of the trustees, DuBarry and Green, who were operating and managing the same, and as such ran trains from Quantico to Washington, using the track of the Alexandria and Washington Railroad under an agreement with George C. Wilkins, receiver, then that company was entitled to a verdict, which was refused, and constitutes the 36th exception.

The same defendant also requested the court to instruct the jury that if they should find from the evidence that that company as a corporation did not, by its servants, agents, or otherwise, exercise any authority or control over

that road between St. Asaph's Junction, Alexandria, and the south end of the Long Bridge after the receiver of the Alexandria and Washington Company took possession of that line of railroad, the verdict must be for the Alexandria and Fredericksburg Road, which was refused, and constitutes the 37th exception.

The court, of its own motion, instructed the jury on the same subject as follows:

> "In order that the Alexandria and Fredericksburg Company be acquitted from responsibility for the reason (the road being in possession of trustees) it should in any event appear that in fact the business of the management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers, and board of directors" (206).

And that this was notoriously so, so that the fact may well be presumed to be known to the public, which constitutes the 53d exception.

And the court further on, of its own motion, instructed the jury:

> "Besides, it should appear that the trustees were not appointed by the procuration or assent of the railroad company, for, if so, the trustees would be as much the agents of the company as the grantees in the trust deed," which constitutes the 54th exception.

In saying to the jury that it must appear, before this defendant could be held not liable, "that the trustees were not appointed by the *procuration or assent* of the railroad company," the court, it seems to me, misapprehended the case. The reason for this declaration given in the same paragraph, is somewhat extraordinary; the reason assigned is that, if so appointed, they would be "as much the agents of the company as the *grantees* in the trust deed."

To say the least, this is not clear. The trustees who took possession were the successors of the original trustees and were appointed as such successors by a court of record of Virginia and as it seems, by virtue of a statute of that State, under the terms of the trust deed (115, 119, 120, 123, 127), which contains a special provision for filling vacancies occurring either by death, resignation, or incapacity (111). The two trustees, DuBarry and Green, who were in charge of the road, by their agents, at the time of the accident, were appointed at different times, to fill vacancies caused by the death of their predecessors respectively. They were each appointed by the court on the petition of the Pennsylvania Railroad Company in its capacity of a creditor, it being the owner of all the bonds secured by the deed of trust. DuBarry was appointed by a decree passed June 24, 1884 (123), and Green was appointed by a decree passed on the 24th of July, 1884 (127).

It appears that some of the first vacancies were filled on the application of the Alexandria and Fredericksburg Company, but it nowhere appears that these trustees, who were in charge of the road at the date of the accident, were appointed either by the "procuration" or "assent" of the Alexandria and Fredericksburg corporation. But it would make no difference if such assent did appear. The trust deed itself provides that this company may take the proceedings necessary to fill vacancies.

This instruction of the court must have misled the jury to the detriment of the defendant the Alexandria and Fredericksburg Company.

The record shows (130) that the then trustees took possession of the road in 1872, and it further shows that after the year 1875 the company had none of the property in its possession, but that the trustees, in January, 1875, appointed

a superintendent, who, for them, had exclusive possession of the property and was in the exclusive management thereof as well as of the business of the road.

The court in general term, in its opinion (228), indulges in some comments upon the manner of taking possession of the property by the trustees and upon their powers under the trust deed. It says that "it does not appear, in point of fact, here, that the circumstances ever arose which justified the trustees in taking possession." It was not necessary to prove the existence of these circumstances; the law presumes that trustees had authority for their acts and did their duty, until the contrary is shown.

The court also declares that the trustees had no power under the deed *to take possession themselves;* that they were *authorized to appoint a receiver to do it*, and that this was not done. This was said notwithstanding the deed provides (110) that in case of default the trustees or their successors shall have the right and power "to enter and take possession of said * * * railway," with all its books, &c. The power is most ample. The trustees are also specially authorized, at their option, to "appoint a receiver, auditor, *agent or agents*, to conduct the affairs of said road, *or to work the same* for the benefit of the holders of the said bonds or coupons, so overdue, or their assigns." The court says they took possession themselves and apparently without authority, but that, "with or without authority, they took possession as trustees or agents of the company *and were their agents.*"

It is probably true that in a certain sense, trustees acting under such a deed of trust are the agents of both parties; they, of course, are bound to act honestly and impartially, but it is undeniable that they are primarily the agents of the creditor. It was not proper for the trial judge to allow the jury to find that these trustees were "agents" of the company in order to hold it liable for damages for their

acts. And in point of fact there was no evidence in the cause to justify such an instruction.

It is useful before proceeding with the next subject, to state the particular parts of the tracks between Washington and Alexandria which were owned or controlled by these three local companies or by those acting in their places. The Baltimore and Potomac Railroad Company owned the railroad from Baltimore to the south end of Long Bridge, including the passenger station at the corner of 6th and B streets in this city; the Alexandria and Washington Company owned, and its receiver held and operated, the track from the south end of Long Bridge to St. Asaph's Junction, and the Alexandria and Fredericksburg owned, and by its trustees operated and managed, the line from St. Asaph's Junction to Alexandria (98, 170, 180). The latter line is only about one mile and one-third in length (134); the Alexandria and Fredericksburg Railway, however, extended beyond Alexandria to Quantico.

The court, on its own motion, further instructed the jury, as stated in the 55th exception, to the effect that the supreme court of appeals of Virginia, in a suit against the same company for personal injuries arising from negligence while the trustees were in possession by virtue of the deed of trust, "under conditions precisely similar to these shown in this case," held, quoting so much from said decision as is quoted in the exception and closing with the following words:

> "It follows that the Alexandria and Fredericksburg Company cannot be excused because of any possession shown in trustees."

The jury by this were told that the fact that the road was in the custody and the exclusive control of trustees could make no difference in any event. This was error.

The instruction prayed by the defendant, the matter of the 36th exception, was manifestly right, because the state of facts it contemplates was the actual possession and exclusive management in the trustees under an arrangement made by them with the receiver of the Alexandria and Washington railroad, by which trains were run beyond the territorial jurisdiction and line of the Alexandria and Fredericksburg road.

The same thing is true under the matter of the 37th exception, where the instruction was asked, as to a state of facts found in the case, to wit, that the Alexandria and Fredericksburg road did not exercise any control whatever upon the trains run from St. Asaph Junction to the south end of Long Bridge when the collision occurred; manifestly the defendant was entitled to have the jury instructed that on such a state of facts the Alexandria and Fredericksburg was not liable.

It would hardly seem to require authority to show that when a creditor in good faith exercises a power to take possession of mortgaged property for the purpose of satisfying the mortgage debt and goes beyond the territorial limits and franchises of the company, running the train into a foreign territory over the track of another road, where an injury and loss occurs, that the railroad company in such a case would not be liable for such loss, because it did not have control nor the right of control.

The settled rule of law is that a railway cannot be made responsible for injuries caused by the neglect of the agents of the trustees.

Wood's Railway Cases, sec. 998, pp. 16, 29.
State v. *E. & N. A. Railway Co.*, 67 Me. 479.
Ballew v. *Farnan*, 9 Allen, 47.
Sprague v. *Smith*, 29 Vt. 421.

Another view, perhaps, is decisive of this question. Suppose the trustees of the Fredericksburg railway had made a contract to carry a passenger or freight from Fredericksburg to Alexandria over its own road and thereafter to continue the transportation over the Alexandria and Washington road to Washington, could such trustees, by such a contract create a liability against the Alexandria and Fredericksburg Company?

In *Railroad Company* v. *Pratt*, 22 Wall. 123, the court said:

> "The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line."
>
> *Pratt* v. *R. R Co.*, 95 U. S., 43.
> *Ins. Co.* v. *Ry. Co.*, 104 U. S. 146.
> *Myrick* v. *Mich. Cent. R.R. Co.*, 107 U. S. 102.

But the instruction as given by the court, by adopting the decision of the supreme court of appeals, rests the question of liability on another and an untenable ground, to wit: That the Fredericksburg Railway Company had no authority in law to execute the mortgage under which the trustees went into possession, and for that reason it is assumed that their possession, control, and management was unlawful, and, therefore, the trustees were, in fact, the agents of the company, and the reason why the mortgage was alleged to be unlawful is stated in the quotation read from the opinion of the supreme court of appeals of Virginia to be that "No provision is found in the charter of the defendant company to transfer to trustees or to mortgagees, under the deed of trust given, as a mere incumbrance and security, the right and legal capacity to step into the shoes of the company and assume and exercise independently the franchises of the company."

Section 3 of the charter authorized the company, for the purpose of constructing, equipping, and operating the road, to sell their bonds, with coupons attached, at interest not exceeding seven per cent., not exceeding one million of dollars.

The right to create the debt carried with it the right to execute a mortgage or deed of trust to secure it.

Green's Brice's Ultra Vires, 213 to 233.
Lehigh Valley Coal Co. v. *Agate Works*, 63 Wis. 45.
Susquehanna Bridge Co. v. *Ins. Co.*, 3 Md. 303.
White v. *C. & C. R.R. Co.*, 1 H. & M. 786.
1st Morawitz on Private Corporations, sec. 346.

From the manner in which *Negly* v. *The Alexandria and Fredericksburg Railway Company* is cited, we suppose that the contention, or understanding, was that that decision was binding authority, because it was a construction of a charter granted by the State of Virginia. It had not, however, such binding authority, as was said in *Oates* v. *National Bank*, 100 U. S. 239. (See page 240):

> "While the federal courts must regard the laws of the several States and their construction by the State courts as rules of decision in trials at common law in courts of the United States in cases where applicable, they are not bound by the decisions of these courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases on the subject." Citing—
> *Swift* v. *Tyson*, 16 Pet. 1.
> *Carpenter* v. *Provident Ins. Co.*, 16 Pet. 495.
> *Watson* v. *Tarpley*, 18 How. 517.

In *Chicago* v. *Robbins*, 2 Black, 418, at page 428, the court said:

> "When rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of a State court."

But when private rights are to be determined by the application of common-law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound to adopt their decisions.

In the case of Negley, no State statute or constitutional provision was construed or involved. It was a simple question of general law, and nothing was said as to the power to convey franchises nor as to the power to make mortgages, nor as to the rights of trustees under mortgages, but the simple question was, whether a corporation, authorized to execute its bonds, could secure these bonds by a pledge of its property. *Olcott* v. *Supervisors*, 16 Wall., 678, is conclusive as to the effect of the State decisions, where it is said "the question considered by the court was not one of interpretation or construction. The meaning of no provision of the State constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any Government, might be authorized. * * * This consideration alone satisfies our minds that *Whiting* v. *Fond Du Lac County* (the decision in the State court) furnishes no rule which should control our judgment, although the case is entitled to great respect."

See, also, the same doctrine, in *Burgess* v. *Seligman*, 107 U. S. 20.

Returning to the question, whether the mortgage or deed of trust was lawful, the rule on that subject is well settled, and it is this: that the inhibition against mortgaging franchises without legislative authority does not extend to the franchise of using railroad property in carrying on the

usual business of the road, but only the franchise "of being a corporation."

In *Hall* v. *Sullivan R.R. Co.*, 21 Law Report, 138, the court said: Franchises are of two kinds—first, that of being a corporation, "which is inalienable without legislative authority;" second, franchises necessary for the running and operating of a railroad which can be mortgaged, with the other tangible property, to borrow money "without other legislative permission."

2d *Redfield* v. *Railways*, 4th ed. p. 466.

Shaw v. *Norfolk Company R.*, 5 Gray, 162.

Wood's Field's Law of Corporations, sec. 426, states the rule thus: "The voluntary sale of a railroad will not carry with it the corporate capacity, charter, and franchises except such as flow from the ownership of the property itself as the right to operate the road and receive tolls and profits thereof."

In *Memphis Railroad Co.* v. *Commissioners*, 112 U. S. 609, at page 619, the court say: "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad as the property incident to it and the franchise of maintaining and operating it as such, and the corporate existence is not essential to its use and enjoyment."

It may be useful to note here that the deed of trust expressly conveys the franchise of the company and authorizes its sale (110, 111) and conveyance according to the code of Virginia. Now the code of Virginia also expressly provides for sales of such franchises, and that the purchaser may adopt such corporate name for his railroad as he may select.

It is submitted that, while it is not error for the court below to adopt the very language of another court, quotations from judicial opinions predicated on a state of facts peculiar to each case are not satisfactory, but misleading to a jury. "But it is error to instruct the jury by reading from the published opinion; what appears apart from the the context is likely to mislead."

Hilliard on New Trials, p. 271, sec. 27, and cases there cited.

Nothing could have been more prejudicial to the defendant in this case than what was done here, to wit: The jury was told that the supreme court of appeals of Virginia, "*under conditions precisely similar to those shown in this case*," held that * * * no provision was found in the charter of the defendant authorizing the mortgage, and then the court added:

> "It follows that the Alexandria and Fredericksburg Company cannot be excused from any liability because of any possession shown in the trustees."

This, it is insisted, took the whole case, so far as that defendant was concerned, absolutely and entirely from the jury. They were told that in just such a case the court of appeals of Virginia had decided that the same railroad company was liable, and that was the law of this case.

This language, it will be observed, is not a quotation from what the court of appeals of Virginia said, but is what the court told the jury in this case; so that if they had found a verdict for the defendants on that issue of possession in the trustees, it would have been against the positive instructions of the court.

The court also added a part of the instruction mentioned in the 54th exception, that is to say, "it should

appear that the trustees were not appointed by the procuration or assent of the railroad company; for, if so, the trustees would be as much the agents of the company as the grantees in the trust deeds." There is not, however, a single fact or circumstance in proof tending to show or suggest any such action on the part of the Fredericksburg Railway Company, and that portion of the instruction was error, because there was nothing in the case on which to found it. This has been discussed in a preceding part of this brief.

It may not, for the reasons stated above, be at all important as to what the proof was as to who was held out as *running* and operating the road, still the court's attention is called thereto. At page 57, "Exhibit Receiver Alexandria and Washington Railroad No. 1," is the title of an agreement, made in 1875, among the three railroads, in which Bacon and Kneesi are described as trustees of the Alexandria and Fredericksburg Railway Company, of the second part.

In the Gibson account, page 82, as rendered by Gibson Brothers in 1884, the title is as follows:

> "Alexandria and Fredericksburg Railway Company, J. N. DuBarry and John P. Green, trustees."

The receipt for the account is found on page 83; it is signed Gibson Brothers:

> "Received of trustees of the Alexandria and Fredericksburg Railway Company."

At pages 84, 85, and 86 are the pay-rolls, rendered in each instance against "Alexandria and Fredericksburg Railway Company, J. N. DuBarry and John P. Green, trustees," signed by twenty-nine separate persons, for two months in 1884 and 1885.

Receipts, checks, endorsements, &c., in the name of J. N. DuBarry and John P. Green, trustees, which passed through the banks in Baltimore and Washington, are found on pages 96, 97, and 98.

The witness Wilkins testifies, page 130, that the trustees took possession on the 6th of December, 1872, and afterwards of all the property of the road of every kind whatsoever, and used and operated the same exclusively up to and beyond the time of the collision in February, 1885, and that at the time of the collision the Alexandria and Fredericksburgh corporation had in its possession no cars, engines, rolling-stock, or any other property whatsoever, and did not have possession of any property subsequent to 1875, and that the trustees, in possession under the deed of trust, appointed the witness superintendent in January, 1875; that he acted for and under the said trustees, and had exclusive possession and exclusively managed said railway, and was continually in notorious public possession thereof, and that the corporation known as the Alexandria and Fredericksburg Railway Company never managed said road after the month of January, 1875, which testimony was subsequently repeated in part by said witness at pp. 135, 136.

That the receipts of the business done over the line was divided *pro rata* among the parties, including the trustees of the Alexandria and Fredericksburg road (page 136).

The manner in which the accounts were kept, to wit, in the name of the trustees, and the testimony in reference thereto, have been referred to in a former part of this brief, and need not now be repeated.

A witness, James L. Davis, in his testimony, found at page 183, testified that he had been employed on the road since 1872; that he was employed by DuBarry; that he ran between Alexandria and Quantico.

The record also discloses the fact, and it is uncontradicted, that the deed of trust was executed to secure a million of dollars of bonds; that the deed was recorded in Alexandria county, Fairfax county, Prince William county, and Stafford county, Virginia; that certain trustees were substituted to fill vacancies occasioned by death or otherwise, which were also recorded in the same counties as hereinbefore stated.

Exceptions 35 (p. 189), 38 (p. 190), and 39 (p. 191) relate to prayers requested on behalf of the Baltimore and Potomac Railroad Company and refused.

That defendant asked the court to instruct the jury, in substance, that it was not liable for the injuries complained of unless its agents were guilty of negligence which brought about or contributed to bring about the injury, and they could not infer such liability from the fact that Bennett, who was the pilot on the Virginia Midland train and wore the uniform of, and was paid his salary in part by, the Baltimore and Potomac Railroad Company, which constituted the 35th exception.

The court was also asked on behalf of that defendant to instruct the jury that it was not liable unless its agents were guilty of negligence which brought about or contributed to bring about the accident, and they cannot infer such agency from the fact that Bennett, the pilot, was put on the Virginia Midland train with authority to control the same, subject to the rules and regulations, if he should deem it necessary, provided he did not in fact interfere with or exercise any control over the train after it left Alexandria, which constituted the 38th exception.

The court was further asked by the said defendant to instruct the jury that if they should find that the men who controlled the Alexandria and Fredericksburg freight, which collided with the passenger train, were wholly paid

by the trustees of the Alexandria and Fredericksburg Railway Company and the receiver of the Alexandria and Washington Company for the services they rendered south of Long Bridge, and shall further find that the business done by the railroads leading from and out of Washington city over Long Bridge, south, was managed by one set of officers who were paid *pro rata* by the trustees of the Alexandria and Fredericksburg, the receiver of the Alexandria and Washington, and the Baltimore and Potomac for such services, then this defendant is not liable, which constitutes the 39th exception.

Of course the rule cannot be controverted that a company cannot be liable unless its agents by their wrongful acts contributed to the injury. It would seem also as plain that the presence of Bennett, pilot on the train, though employed by the Baltimore and Potomac, could not render that defendant liable unless he exercised some control over the movements of the train.

The undisputed proof is that when the Midland train arrived at Alexandria, the conductor, a servant of the Virginia Midland, who had brought the train to that point, was still thereon, and that Bruce, the engineer, who had run the train from the south to that point, was still in charge of and managed the engine up to the time of the collision; that Bennett got onto the train at the depot in Alexandria, and that after the train started he remained seated in the car and took no control, responsibility, or management whatever. The only thing he did was to say in the depot, before starting:

"Go ahead."

By the rules, the engineer and the conductor were made equally responsible. The accident was the direct result of the negligence of the engineer Bruce, who ran the north-bound train, or the engineer who ran the south-bound

freight train, or both, as to which—the running of the engine, the control of the signals—Bennett took no part, and taking no part it was to the Baltimore and Potomac as though he had not been on the train; and no liability was cast on that road by the fact that he might have run the engine but did not.

The effect has already been considered herein of a division in the payment of the expenses in running the trains by the trustees, the receiver, and the Baltimore and Potomac.

The court was asked to instruct the jury that there was no testimony of any kind whatever that the automatic signals in use were out of order on that occasion, which instruction was refused (p. 188.)

The court, on its own motion, however, instructed the jury: "It is claimed that the signals were out of order; if you find this to be the fact," and that the engineers and conductors on either trains were negligent, then the Alexandria and Washington Railroad, "or its receiver," with such of the other defendant companies as you may find were jointly associated and acting with the "Alexandria and Washington Railroad Company or with the receiver in running and operating trains over the Alexandria and Washington road," are guilty of negligence, which constitutes the 60th exception (p. 210).

We have presented here the same question as to the duty of the court to instruct the jury to find for the defendant on an issue as to which there is positively no testimony; that refusal was error, for the reasons mentioned in the preceding subdivisions of this brief.

The instruction as given (60th exception), it is insisted, is manifestly erroneous, because it assumes a state of facts, in support of which there is no testimony whatever, to wit, that the signals were out of order at the time of the accident.

This instruction as given was also erroneous, because it made all the companies—Alexandria and Washington, Alexandria and Fredericksburg, Baltimore and Potomac, and the Pennsylvania Company—jointly liable if the signals were out of order on the single condition that they or any of them were "jointly associated" in acting with the Alexandria and Washington or with the receiver "in running and operating trains over the Alexandria and Washington Railroad; that is to say, no matter how they were operating, and no matter if there was no contract, express or implied, to be jointly liable, and no holding themselves out to the public as partners.

It was a grave error of the court to allow the jury to determine whether or not the signals at the time of the accident were or not out of order, because there was no evidence to justify such an instruction. The substance of the whole testimony on this subject goes to show only that the signals, at some time not mentioned, had been out of order, and were liable to get out of order (72, 73, 184). No witness said the signals did not work at the time of the accident, and Bruce, the engineer on the Virginia Midland train, testified that a white light was by it exhibited to him. At the close of the evidence the court was asked (187) to tell the jury that there was no evidence from which the jury could find that the signals were out of order, but the court refused so to do and instructed the jury as above stated (210).

It must not be overlooked in this connection that this apparatus for signalling was put there by the receiver of the Alexandria and Washington Company in obedience to or by leave of the circuit court of the United States (139). If, therefore, the accident occurred because of the defects of this signal, the other defendants ought not to be punished; they had nothing to do with it.

A material question in the case was whether the printed regulations in respect to a single track applied to the gauntlet. The defendants asked the court to instruct the jury that these regulations had no application to trains approaching the gauntlet, which is the matter of the 33d exception (p. 188).

The plaintiffs claimed that the rules and regulations relating to a single track did apply at the gauntlet, and for that reason the Midland train had priority over the south-bound freight train.

The defendants asked the court to instruct the jury that neither of the trains had any priority over any other train in the use of the gauntlet, and the Virginia Midland had no right to proceed, simply because it was a passenger train bound north, over the Alexandria and Fredericksburg freight train, bound south, which was refused, and is the 34th exception (p. 188).

The court, on its own motion, instructed the jury that rule No. 1, giving to north-bound trains right of track, did apply to the gauntlet; "that the north-bound train had the right of track over the south-bound fast freight," which constitutes the 58th exception (p. 209).

The court further, on its own motion, instructed the jury that it was the duty of the south-bound freight train, if it saw the north-bound passenger train, to stop before reaching the point of the intersection of the tracks, and permit the north-bound train to pass through the gauntlet before proceeding, which constitutes the 59th exception (p. 210).

Testimony having been given tending to establish a general custom among train-men to stop when approaching the arch, upon discovering a train on the opposite side thereof, and await a signal to proceed, without any reference to priority of one train over another, the jury were instructed to disregard it.

The matters referred to above, it will be perceived, are of the most vital character. The plaintiffs contended that the north-bound passenger train had the absolute right of way through the gauntlet, the defendants contending that the train reaching the gauntlet first had the right, and it was its duty to pass through unless the signals were wrong, or the track was seen to be obstructed. The printed rules are not only to control, but they are to be so construed as to give a natural and legitimate effect to each of them and every part thereof, if it can be done.

Rule 1, printed on the face of the time-table (45) which went into effect on November 2, 1884, provided that "all north-bound trains shall have absolute right of track over trains of the same or inferior class running in the opposite direction;" but printed in large type over and as controlling rules 1, 2, and 3, is the following: "Observe rule 90 at the south end of Long Bridge, Aqueduct Gauntlet, St. Asaph Junction, Virginia Midland Crossing, and drawbridges at Long Bridge, Nabsco, Powell's Creek, and Quantico Creek."

Rule 90, which is thus made to govern and control at the Aqueduct Gauntlet, is as follows:

> "All trains must approach the end of double track, junctions, railroad crossings at grade, and drawbridges *prepared to stop*, and must not proceed until the switches or signals are seen to be right or the track is plainly seen to be clear."

This regulation cannot be said to be ambiguous. What was to be done at the gauntlet was distinctly pointed out in a special rule, specially referred to. What was to be done there was also to be done at drawbridges, at junctions, and wherever there was a railroad crossing at grade. Those were points of the greatest danger, and therefore it was

that the same rule applied to each of them, and it would be just as reasonable to say that a train had a right—nay, it was its duty, to govern itself at the drawbridge by the same rule which governed it in passing over a single track. The only way in which a railroad could be operated at a gauntlet or a drawbridge is for the train which arrives first to go through, and that was the practice here.

On this particular occasion, the fast freight, bound south, probably arrived at the junction first, but the engineer, Bruce, of the north-bound passenger train, seeing the fast freight north of the arch, did not observe rule 90, but approached the south end of the gauntlet at a high rate of speed instead of being prepared to stop, and therefore, instead of trying to stop, increased his speed, hoping to pass over the gauntlet at the north end before the fast freight entered the gauntlet at the same end, which is proven by the testimony of the witness Thomas Taylor (page 138), who asked Bruce immediately after the accident, while the latter supposed himself to be in a dying condition, how it happened, and "Bruce said he saw the other train (the fast freight) but thought she was standing still, and when he found out his mistake he tried to clear the arch, and ran as fast as he could.

Bruce also at the time of the accident told the witness Burke, "I saw the light of the freight when she was on Hunter's Hill, when I was at the junction. I tried to get out of the way, but she came down on me at forty miles."

The disregard of this special rule applicable to the gauntlet was the cause of the collision; and if that rule did not apply at the gauntlet and to these trains, then it had no application anywhere. The single track referred to and to which rule 1 applied, began at Duke street, Alexandria, and extended to St. Asaph Junction, 1.33 miles, one-fourth of the whole length of the road.

The double track extended from St. Asaph Junction to Washington through the Aqueduct Gauntlet and over the Long Bridge, precisely as elsewhere along the line of the road. See record, page 134.

The evidence of that fact is found in the report made by examiner Fowler and put in evidence in these cases. The language is (in speaking of the property and of what it consisted), "a single track from Duke street, in Alexandria, to St. Asaph Junction, and a double track from St. Asaph Junction to the south end of Long Bridge, 3.63 miles."

There was, as we see, then, no single track, as a matter of fact, through the gauntlet, but there were two tracks, each with two separate rails: a west track, that was used exclusively by the trains going south; and an east track, which was used exclusively by the trains going north; or, in other words, the two rails on which the south-bound fast freight ran were not used or run over at any time by the north-bound train.

It is true that two trains could not pass through the Aqueduct at the same time in opposite directions, because the space was not sufficient for the tracks. The tracks, however, are distinct and separate, though they interlace.

We see, then, that there was a single track to which rule 1 applied. There was a double track and there was also a gauntlet to which rule 90 applied. This gives full operation and effect to both rules.

Rule 90 (45) was specially made to the approaches to the gauntlet by the prominent note on the corner of Time-Table No. 3 (p. 4), which says: "Observe rule 90 at south end Long Bridge, *aqueduct gauntlet*, St. Asaph's Junction," etc., etc.

If the Virginia Midland engineman had approached the south face of the gauntlet "prepared to stop" he would have seen the south-bound freight train and could have stopped.

The interpretation put upon this rule by the trial justice deprives it of all efficacy; that a train may proceed as if it had the right to the track, and at the same time be "prepared to stop," involves an inconsistency. It must have been under the pressure of this instruction that the jury rendered a verdict in favor of the Virginia Midland Company. They could not well have done otherwise. It is submitted that this interpretation of rule 90 was wholly inadmissible.

In order to emphasize this rule (90) the superintendent issued a special notice (72) instructing those running trains in addition to what is found in rule 90. This notice requires that "all trains must * * * approach those signals cautiously, *expecting to find them blocked*, and not allow the engine to pass them until an open and clear signal is shown."

The instructions embodied in the 57th and 59th exceptions are not only erroneous for the reason mentioned above, but because there was no evidence whatever in the case showing, or tending to show, that the south-bound fast freight *saw the approaching north-bound train*, and there could not be any testimony, because both the engineer and conductor were instantly killed; but the instruction should have been applied not to the south-bound but to the north-bound train, which latter did, as has already been shown, see the south-bound train in time to have avoided collision.

The following exceptions, 40 (page 192), 41 (page 192), 42 (page 192), 43 (page 193), 44 (page 194), 46 (page 195), 49 (page 196), all relate to the important question of negligence. The defendants asked the court to charge the jury that if Bruce, the engineer who ran the passenger train at the time of the collision, saw, or ought to have seen, the headlight of the fast freight train north of the arch, after Bruce had passed the south signal light, south of the gaunt-

let, he was chargeable with negligence, causing the injury complained of, provided the jury also found that Bruce increased the speed of his train between the south light and gauntlet, and provided the fast freight was at the time so near the gauntlet as to make such increase of speed dangerous.

The distance from the south halting box to the south side of the arch was about one thousand feet, while the distance from the signal to the south end of the gauntlet is, perhaps, one hundred and fifty less, or eight hundred and fifty feet. Now, this instruction asks that the jury be told that if Bruce saw the headlight of the fast freight north of the arch when he was eight hundred feet or more from and south of the gauntlet, he should have stopped—obey the the rule, approach the gauntlet prepared to stop—for until his engine had entered the gauntlet there could be no collision, and the collision was, therefore, solely owing to his neglect of that duty and to his disregard of that rule.

The prayer mentioned in the 41st exception asked the court to instruct the jury that if they found that the accident was proximately caused by Bruce's neglect, the verdict must be for all of the companies except the Midland road, and that in the 42d asked the court to instruct the jury that if the injury was caused solely by the negligence of Bruce, the verdict should be in favor of the same defendants.

The prayer mentioned in the 43d exception asked an instruction to the effect that if Bruce saw north of the arch the headlight of the fast freight after he had passed the signal south of the arch and before he reached the gauntlet, then a verdict should be for the same defendant companies.

The defendants asked an instruction (44th Ex.) to the effect that if Bruce saw, or ought to have seen, north of and near to the arch, the headlight of the fast freight, as

he approached the gauntlet and after he had passed the south signal-light, and he then unreasonably increased his speed as he approached the gauntlet, he (Bruce) was responsible for the negligence which caused the injury.

The prayer embraced in the 46th exception is to the point that if Bruce saw or ought to have seen the headlight of the freight train at the north side of the arch at the time he passed the signal south of the arch, and did not therefore approach the gauntlet prepared to stop, he was guilty of negligence which was the proximate cause of the collision.

And the point of the 47th exception is that if Bruce saw the headlight of the fast freight north of the arch, or ought to have seen it, at the time he passed the signal south of the arch, but did not approach the gauntlet prepared to stop, then he was guilty of negligence, and must be held responsible for the accident, and these defendants were entitled to a verdict.

The 49th exception is to the point that the liability for injury suffered in this case falls upon the company in whose service the person was whose negligence or wrong-doing caused the injury; and if Bruce, without any interference, direction, or control by Bennett, by his negligent acts caused the injury, then the other defendant companies were entitled to a verdict.

The simplest statement of the real point of all these instructions is this: That if Bruce saw the light of the fast freight north of the arch before he entered the gauntlet he should not have proceeded, and if he did enter it and did increase the speed he was the sole cause of the accident.

In the prayer referred to in the 48th exception the defendants asked the court to instruct the jury that if injury was occasioned by the concurrent act of two carriers, one of

whom had entered into a contract with the party injured for carriage or transportation, and no such contract existed between the plaintiffs and the other carrier, that company which had the contract was liable, and the others were not liable.

It seemed to be the ambition of counsel for the plaintiffs to hold the Pennsylvania Railroad Company liable for the consequences of this accident. The evidence produced and admitted for this purpose seemed to me to be very remote.

The 62d exception (211) contains a prayer in behalf of the companies, now plaintiffs in error, which was given only in part. This exhibits a fair specimen of the evidence allowed to go to the jury, from which they were authorized to infer a joint liability of the Pennsylvania Railroad Company with the three local organizations. It is also a fair specimen of the evidence relied on by the plaintiffs' counsel in the trial court and the general term to hold the Pennsylvania Railroad Company to a joint liability.

Two reports of the officers of the Pennsylvania Railroad Company to the stockholders were admitted in evidence over the objections of counsel, one of which stated that it was a report, among other things, of roads under "your *control*," and the other of roads included in "your system;" these reports showed that the Pennsylvania Railroad Company owned all the bonds of the Alexandria and Fredericksburg Railway Company, and a large sum in the bonds of the Baltimore and Potomac Company, and also a large part of the capital stock of the latter company (151). This was admitted as proper evidence by the court. In the final instructions to the jury the court told them that this was "competent evidence to go to the jury." * * * "These circumstances," said the court to the jury, "are to be considered with all the other circumstances from which the

jury are to determine whether or not the Pennsylvania Railroad Company has any such interest in this case as will hold it liable and responsible to the plaintiffs."

The general term mentions this ruling and distinctly approves it (224).

It may not be uninteresting to refer this court to a previous decision of the general term where the precise question was presented in reference to the Pennsylvania Railroad Company, and it was decided the other way. In *Moynihan* v. *The Pennsylvania Railroad Company* (19 D.C. Reports, 573) the same kind of evidence was offered to show that the Pennsylvania Railroad Company and the Northern Central Railroad Company were the same, and that the former was responsible for the shortcomings of the latter, and the court in general term held the evidence inadmissible. In disposing of the question the court said:

> "In order to prove the identity of this defendant (the Pennsylvania Railroad Company) with the Northern Central Railroad Company, the plaintiff offered in evidence the annual report of the president and directors of the Pennsylvania Railroad Company, which alludes to the roads under the control of that company, among which is this road, the Northern Central. But on further inspection of the report it is seen that the control referred to is that of *stockholders*. It appears that they own a large amount of the stock of that road, and control the road in that way. It does not appear that the Pennsylvania Railroad, as such, appointed the officers of the other roads, or controlled them in any other respect, and the court below held that the report referred to could not be admitted in evidence, and would not permit certain marked passages therein to be read or given in evidence to the jury. We fully concur with the court in that ruling. This report shows that defendant, as a stockholder, had control of the road, but not in such a way as to

make it responsible as a company for all the acts of the Northern Central Railroad Company nor its officers."

I submit that this first judgment of the general term was the correct one.

Relating to the question of the joint liability of the Pennsylvania Railroad Company is the matter of the 63d exception (212). The court then told the jury that in order to hold this company responsible in these cases they must find that some "actual arrangement" existed by which that company was interested with the local companies in running the trains over this road, and the trial justice then proceeding said, "or you must be satisfied from the evidence that, by reason of some arrangement or condition of things, the Pennsylvania Company *had the right*, as between the parties, *as a corporation, to, and did, issue any order or regulation that it chose to those who were engaged in running trains over the Alexandria and Washington Railroad in relation thereto, and such orders and regulations when made were accepted and obeyed.*"

There cannot be found in this record one syllable of evidence, and there was no such evidence in the case, tending to show or squinting in the remotest degree toward the right of the Pennsylvania Railroad Company to, or that it did, issue any such order or regulation. This was wholly gratuitous. The evidence, if it established anything, showed clearly that the Pennsylvania Railroad Company had no interest or authority in or about the management of the Alexandria and Washington Railroad Company. Wilkins, the only witness who testified on this subject, the witness who necessarily knew all about it, said:

"Q. What management or control, if any, did the Pennsylvania Railroad Company, as a corporation,

have and exercise over the road that you held as receiver during this period? Tell us what they did.

"A. It had no control whatever."

And being at the same time cross-examined by counsel for the two plaintiffs the said Wilkins, in response to the following questions, answered as follows, to wit:

"Q. Is it true that the Alexandria and Washington Railroad was operated on 4.96 miles from Alexandria to the south end of Long Bridge in 1885?

"A. By whom?

"Q. By anybody?

"A. Certainly it was operated.

"Q. By whom?

"A. By the receiver, George C. Wilkins.

"Q. By anybody else?

"A. By no one else.

"Q. In whose interest?

"A. I could not tell you; it was to whom it might concern. It was in the hands of the court; the object of putting it into court being, as I understood, to learn who were the owners of it.

"Q. Had the Pennsylvania Railroad any interest in its operation?

"A. It had nothing whatever to do with the operation of the Alexandria and Washington Railroad.

"Q. That is not the question; it had no interest?

"A. No, sir.

"Q. That you testify to distinctly?

"A. Yes, sir.

"Q. How do you know?

"A. For the simple reason that I made all my returns to the court. All the money that came into my hands, as receiver, I paid over by direction—or deposited, rather—by direction of the court in one of the banks in Alexandria.

"Q. How do you know that back of your receivership the Pennsylvania Railroad did not repose and have an interest in all that you did as receiver?

"A. I can only testify as to the fact of what I did with the money.

"Q. What did you do with it?

"A. I deposited it, as I have stated.

"Q. Where did it go then?

"A. I afterwards distributed it by direction of the court."

The court will search the record in vain for any evidence justifying such an extraordinary instruction.

On this subject, the liability of the Pennsylvania Railroad Company, it is deemed worth while to invite the further attention of the court to the opinion of the general term. In its opinion that court said (226): "Perhaps one of the most important facts is the sale of tickets over the roads by the Pennsylvania Railroad Company." It is submitted that this fact is not only not important but that the evidence was wholly incompetent to go to the jury as evidence tending to show an agreement or arrangement which would hold that company liable for these damages. It is a fact that this company had and has a general ticket office in this city; it is also common knowledge that all the great trunk lines, as they are called, maintain ticket offices in all the principal cities. Even if the Pennsylvania Railroad Company was not a creditor and stockholder, it would be but natural that it should sell tickets south over these roads. But when we consider that it was a creditor of the Alexandria and Fredericksburg Company to the extent of one million of dollars, and of the Baltimore and Potomac Company of about four times that sum, it is easy to see why it sold these tickets; it seems to me that on the commonest business principles it should do this. How this fact could tend to show a partnership relation or a joint contract liability, it was the province of the court below to declare for the first time.

(It may be noted here that the Pennsylvania Railroad

Company does not appear to be in any way interested in the stock or bonds of the Alexandria and Washington Railroad Company.)

Another fact which seems to have made a strong impression on the mind of the court below, was the fact that a meeting of the Alexandria and Washington Railroad Company's officers was once held at the office of the Pennsylvania Railroad Company in Philadelphia. I am unable to understand how this fact could be allowed to have weight in deciding such a question, and I submit to the court that it could have no weight, and was not legitimate evidence.

It appears that in the conduct of the business of these various companies an advertisement was issued and published which notified the public of the time of the departure of trains from the passenger station at the corner of 6th and B streets, in this city (79). This advertisement was headed "*The Great Pennsylvania Route to the Northwest and Southwest.*" This advertisement was admitted in evidence, over the protest of the defendant, to show joint liability on the part of the Pennsylvania Railroad Company; and the court in general term (219, 225) regarded this as proper evidence to show the *control* of the Pennsylvania Railroad Company over the other local roads. I submit that if corporate liability of one railroad for the negligence of another can be deduced from such evidence, no railroad company is safe.

The court in general term indulges in some comments (228) as to the alleged failure of the Pennsylvania Railroad Company to "explain away" these "compromising circumstances," as they are termed. Counsel for the defendant companies did not and does not regard these circumstances as "compromising;" but in addition to this, what explanation, more than was given, could have been given? All the facts were then before the court. Wilkins, the

person of all others who knows about the relations of the Pennsylvania Railroad Company with the other companies, told all there was to tell about it. It is an undisputed fact that the Pennsylvania Railroad Company is a bondholder and a stockholder in the Baltimore and Potomac Company and the owner of all the bonds of the Alexandria and Fredericksburg Company, and to this extent is necessarily interested in the success of these companies. It is further undeniably true that these local roads are feeders to it, and hence it is again interested to this extent. Further than this, being managed in connection with the Pennsylvania Railroad Company, these lines form a through line from New York city to the south, under coöperating management, and this, also, is an advantage to all the companies as well as to the public. But is this evidence of a joint responsibility?

It may not be out of place to invite the attention of the court to the testimony of the witness Barber; he seemed to be very anxious to show, without actually saying so, that the Pennsylvania Railroad Company, as a corporation, was dealing with him; but he was made to admit that he was only dealing with those he was pleased to call "the Pennsylvania people." It is plain from his testimony that he was dealing with the officers representing the three local organizations; some of these happened to be officers of the Pennsylvania Railroad Company.

At this point it may be well to suggest the inquiry, What materiality is there in the fact that some of the officers of the Pennsylvania Railroad Company were also officers of the three local companies? If there is any, I fail to detect it.

The point is made both by the counsel for the defendants in error and by the court in general term that, there being no reasons for objections to the admissibility of ev-

idence assigned here, these objections and the exceptions based on them will not be considered. I answer this by saying, in the first place, that this becomes immaterial, as the evidence objected to must be considered on the motion for a verdict at the close of the trial. In the second place, I beg to suggest that this objection is highly technical. One of the reasons assigned for this rule is that objections to the admissibility of evidence without pointing out the reasons therefor must be embarrassing to the trial court. I do not remember a single instance, in many years of practice, where, on the trial of a cause, such objections were not accompanied by reasons. I have never known a trial judge to be embarrassed in this manner. I hope I will be pardoned for suggesting that this rule is one which is more "honored in the breach than in the observance."

Before concluding this long brief, I beg to suggest another inquiry: How could the Pennsylvania Railroad Company, in its *corporate capacity*, make such a contract arrangement with the three local roads as would make it liable as a partner or otherwise for the acts of negligence of those roads? The Pennsylvania Railroad Company is a corporation created by the laws of Pennsylvania, and its nearest track is at least one hundred miles away from the locality of the operations of these companies. Would the stockholders of the Pennsylvania Railroad Company be bound by such an arrangement? Would such a contract be *ultra vires?* It is easy to understand that a contract might be made for carrying a passenger or freight over their lines at the sole risk of the carrier, the Pennsylvania Railroad Company, but that is a special agreement for a consideration. The alleged contract would be a general contract and without special consideration.

Should the court be of the opinion that the motion for a verdict should have been granted as to the Pennsylvania Rail-

road Company, but otherwise as to the other three companies, then the question will arise as to the judgment to be rendered. I submit that if any one of these four companies cannot be held, no one of them can be. The other defendants could not have had a fair trial if the Pennsylvania Railroad Company was not properly joined. This great mass of evidence adduced to hold the latter company necessarily confused the jury and diverted their minds from the true issue in hand; it made what should be a very simple, a very complicated issue. Plaintiffs join defendants at their peril.

The judgments in these causes should be reversed.

ENOCH TOTTEN,
For Plaintiffs in Error.